

1 STATE OF INDIANA)
2 COUNTY OF DELAWARE)
3
4 IN THE DELAWARE COUNTY SUPERIOR COURT
5 CRAIG DUNN and PHILIP WILEY,)
et al.,)
6 Plaintiffs,)
7 -v-) CAUSE NO.
8 RJR NABISCO HOLDINGS)
CORPORATIONS, et al.,)
9 Defendants.)
10
11 VOLUME 8
12 FEBRUARY 19, 1998
13 P.M. Session
14
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1 (Jury not present)
2 THE COURT: Thank you, be seated.
3 Good morning, gentlemen.

4 ALL: Good morning.
5 THE COURT: Plaintiffs' counsel are
6 present. All defendants represented this
7 morning?

8 MR. OHLEMAYER: Yes, sir.
9 THE COURT: For the record, jury is
10 not present. We have an issue regarding
11 submission of some documentary evidence
12 regarding Dr. Burns' testimony. Who is
13 going to handle that for the plaintiff?

14 MR. WESTBROOK: Your Honor, Ed
15 Westbrook for the plaintiffs. We have a
16 group of documents that we would like to
17 argue this morning. If there are no
18 objections, move them into evidence. If
19 there are objections, argue those, because
20 we do intend to put those documents into
21 evidence regardless of whether they're used
22 with Dr. Burns. So I think the question is
23 can we get them into evidence. If we can
24 get them into evidence, then the subsequent
25 question is can Dr. Burns comment on them.

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1 So we would like to address the
2 admissibility question.

3 THE COURT: Last night, if I
4 understood Mr. Motley, the proposal, as I
5 understood it, was that these would be
6 offered in terms of Dr. Burns' expert
7 opinion. Is that the purpose of the offer
8 today?

9 MR. WESTBROOK: Your Honor, the
10 purpose of the offer today is to move them
11 into evidence in their entirety. Some of
12 the documents Dr. Burns may rely on for his
13 testimony. But the admissibility of these
14 documents is not dependent on Dr. Burns.

15 THE COURT: I may have
16 misunderstood Mr. Motley, then, last
17 evening.

18 MR. WESTBROOK: I don't think it's
19 a misunderstanding. It's a matter of which
20 comes first. I think the documents are
21 admissible independently, and then Dr. Burns
22 will likely rely and comment on some of
23 those and those will likely become apparent
24 as we discuss them, Your Honor, to --
25

THE COURT: They are offered as

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1 substantive evidence, not as evidence just
2 in aid of his opinion?

3 MR. WESTBROOK: That's correct,
4 Your Honor.

5 THE COURT: All right.

6 MR. WESTBROOK: Your Honor, to move
7 this along, I've tried to group the
8 documents so we can avoid a one-by-one march
9 and see if it helps or doesn't help. I'm
10 not sure it will.

11 THE COURT: All right.

12 MR. WESTBROOK: Your Honor, the
13 first three documents I would like to talk
14 about in order are Exhibit 25028, 7129, and

943. And Your Honor, I'll hand them up to you so that you have a copy while we discuss them.

And, Your Honor, what those are, just in outline, 25028 is a Tobacco Institute 1979 Counter-Surgeon General's Report. A report that the Institute got prepared and argue to steal the thunder from the Surgeon General's 1979 report. That's what the first document is.

The second document, 7129, is a Tobacco
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Institute memo a few weeks later discussing how they prepared the Counter-Surgeon General's report and what success they had in stealing the Surgeon General's thunder.

The third document, 943, is a BATCO document several months thereafter in September of '79, giving BATCO's comments both on the Surgeon General's report and on TI's Counter-Surgeon General's Report.

So that's why the three documents are grouped together. We have the Counter-Surgeon General's Report, the TI memo discussing why they prepared it and how they got it disseminated, and BATCO's comments on both the Surgeon General's Report and the Counter-Surgeon General's Report. And we'd move those three documents into evidence, Your Honor.

THE COURT: Mr. Ohlemeyer, let me ask you, first of all, have you had an opportunity to review all the documents offered by plaintiff?

MR. OHLEMAYER: Yes, I have, Your Honor.

THE COURT: All right. Are there
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documents against which there is no objection?

MR. OHLEMAYER: There may be a couple but there aren't many.

THE COURT: All right.
MR. MOTLEY: Gee, I'm surp

THE COURT: First three,
Mr. Ohlemeyer?

MR. O

Honor, I'm not sure who they're offered against, so...

THE COURT: Good point.
MR. WESTBROOK: Your Honor, the Tobacco Institute Counter-Surgeon General's report is offered against the Tobacco Institute and its members as we did with the other Tobacco Institute documents. That is document 25028.

The second document, the Tobacco Institute memorandum on how they prepared the Counter-Surgeon General's Report and the success they had is similarly offered against the Tobacco Institute and its members.

And the third document, the BATCO

1 comments on the Counter-Surgeon General's
2 Report, is offered against BAT and Brown &
3 Williamson.

4 MR. SHOCKLEY: Mr. Westbrook, who
5 are the members in '79 and TI you maintain
6 it's admissible against?

7 MR. WESTBROOK: 1979, Your Honor,
8 according to the defendants' responses, the
9 members of the Tobacco Institute, Brown &
10 Williamson Industries, Brown & Williamson
11 Tobacco, Liggett & Myers, Lorillard, Philip
12 Morris, RJ Reynolds Industries, RJ Reynolds
13 Tobacco.

14 MR. OHLEMAYER: Your Honor, with
15 respect to 25028, this so-called
16 Counter-Surgeon General's Report, there may
17 have been such a report, and it may have
18 been distributed, but there is no evidence
19 that this is it. I mean, this is -- you
20 know, look at it. It could be a draft of
21 that, it could be the first draft, it could
22 be the last draft, it could be anything in
23 between. But 7129 does not identify this as
24 such a report, and it doesn't indicate that
25 this, 25028, was actually distributed to

1 anyone.

2 With respect to 7129, there is no
3 foundation to establish who Mr. Frankovic
4 is, whether anyone agrees with anything he
5 said or whether any of this is accurate or
6 inaccurate, or whether it was the result of
7 conduct on the part of one or more of the
8 parties in this case.

9 And with respect to 943, Your Honor, we
10 have somebody that's -- the title is "Some
11 Comments." Somebody's comments on the '79
12 Surgeon General's Report. There is no
13 indication who this was shared with, who
14 this was shared by, or who this was
15 communicated to.

16 So for all those reasons, Your Honor, I
17 don't think there is a foundation
18 established to admit these or to establish
19 relevance to this case, and to admit them
20 would cause confusion or prejudice which
21 outweighs the probative value.

22 THE COURT: On the last it says
23 author P.N. Lee, but your comment is we
24 don't know who P.N. Lee is.

25 MR. TRINGALI: Your Honor, may I

1 just be heard separately with regard to the
2 last document, 943?

3 THE COURT: 943, sure.

4 MR. TRINGALI: One of the
5 defendants they want to introduce it against
6 is BAT Industries. Mr. Westbrook has
7 represented that the document is from
8 British American Tobacco Company, which is a
9 subsidiary. It is not the parent company,
10 BAT Industries. The document, I don't think

11 that Mr. Westbrook would deny this, is
12 neither written by nor sent to, nor found in
13 the files of BAT Industries. And there is
14 no basis, just because we're the parent
15 company, under the law, to introduce that
16 document against us. Thank you.

17 MR. OHLEMAYER: Or anyone else, for
18 that matter.

19 THE COURT: Mr. Wagner.

20 MR. WAGNER: To supplement
21 Mr. Ohlemeyer's objections to 943, if I may,
22 I'd also like to object to 943 on these
23 grounds.

24 First of all, it's irrelevant and
25 contains much irrelevant material such as

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1 children of parents who smoke, heart
2 problems, it's replete with double hearsay,
3 Your Honor, and it's extremely prejudicial,
4 and I know what the plaintiffs want to do
5 with this.

6 If you'd look at page 6, for example --
7 these pages are not numbered. If you go to
8 page 6, you see there in 3.2 subparagraph b
9 a double hearsay statement, a reference to a
10 Julian Peto about saving the country money
11 by increasing the number of people dying
12 soon after retirement as a reference to the
13 document, the Surgeon General's Report,
14 about costing the nation so much money and
15 so forth.

16 So we've got not only hearsay here, but
17 we've got double and triple hearsay
18 throughout this document. And it's going to
19 be very prejudicial to the defendants if
20 this is admitted.

21 Also on page 14, Your Honor, there is a
22 reference to youth smoking, which is a
23 subject of Your Honor's motion in limine
24 which was granted before trial, and that
25 subject is excluded from the trial.

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1 It also, second page from the end, Your
2 Honor, contains references to documents that
3 are not before the jury and it's going to be
4 very confusing. We don't know who the
5 author is. We don't know what was done with
6 this document, we don't know who it was
7 given to, and the jury is going to speculate
8 about this document and its intentions and
9 what was done with it, and I think for all
10 those reasons it is further objectionable
11 and should not be admitted.

12 MR. WESTBROOK: Your Honor, would
13 you like me to respond to some or all of
14 those?

15 THE COURT: Take the first one,
16 what you call a Counter-Surgeon General
17 Report.

18 MR. WESTBROOK: Yes, Your Honor.
19 First of all, with respect to whether it's a
20 draft of whose document it is, if Your Honor
21 would turn into the fourth page of the

22 document, you will see that it is not a
23 draft. It's signed by the president of the
24 Tobacco Institute. Your Honor, it is their
25 document. On the first page it bears the

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1 stamped typed logo, "The Tobacco Institute."
2 It is a defendant's document in this case.
3 It was produced to us by one of the Tobacco
4 Institute members, of Philip Morris.

5 As to the redactions, Your Honor, if
6 there is something within the document that
7 refers to children or something that they
8 want specifically redacted, we don't have a
9 problem with taking that out of the
10 document. But there is no question that
11 this is an authentic document, Your Honor.
12 There has been no challenge to authenticity
13 of the document. It's a business record and
14 it's a signed copy of the document.

15 Also, Your Honor, the document also is
16 consistent with the next memorandum, that is
17 the Tobacco Institute January 25 memorandum
18 which was issued just two weeks after the
19 January 10th document. And that's where
20 they report to their members on the
21 activities that they undertook in issuing
22 this document.

23 And you'll notice on the second page of
24 Exhibit 7129, they've specifically
25 referenced our report, "Smoking and Health

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1 1964 to 1979, The Continuing Controversy."
2 That is exactly the title of 25028, the
3 major report. And they talk about exactly
4 how they put it together. There couldn't be
5 a more specific road map as to how this
6 document was created than what it is than
7 Exhibit 7129, 425028.

8 THE COURT: Talk about the third
9 document, 943.

10 MR. WESTBROOK: The third document,
11 943, was produced to us by BATCO, and that
12 document is internally consistent as to
13 time. It comes several months after the
14 report was issued, and Your Honor will
15 notice that back on page 17, the author
16 discusses the Tobacco Institute report, The
17 Continuing Controversy, and goes through it
18 and discusses that specific report.

19 As to the issue, Your Honor, of BATCO
20 and BAT, Your Honor did address that in
21 connection with some other documents, and I
22 have some further information that I think,
23 hopefully, will clear up BATCO issues and
24 move these BAT things along which will put
25 the relationship, I believe, Your Honor, of

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1 BAT, BATCO and B&W hopefully to rest.
2 If I may, Your Honor, I have a notebook
3 of exhibits with a short outline and
4 improved diagram, and a copy for the
5 defendants as well.

6 Your Honor, if I could take a minute,

7 because I think through the rest of the case
8 when this issue comes up about BATCO
9 documents, to discuss why it is that BATCO
10 documents are admissible against both BAT
11 and B&W.

12 THE COURT: Go ahead.

13 MR. WESTBROOK: Basically, Your
14 Honor, the documents that I have attached to
15 the short outline indicate that BAT, I
16 believe as Mr. Motley calls them, Big BAT,
17 delegated worldwide tobacco issue
18 coordination to BATCO, and that is in
19 attachment one, Your Honor, which is a BAT
20 annual report.

21 The document states -- this is a BAT
22 report saying that British American Tobacco
23 Company, Limited, that's BATCO, is
24 responsible for the group's tobacco
25 interests in 48 countries with principal

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1 subsidiaries in the U.K., Europe, Latin
2 America, the Caribbean, Asia and Africa. It
3 also coordinates key strategies for all
4 group tobacco companies, including those in
5 the U.S.A.

6 That's Brown & Williamson, Your Honor.
7 So BAT, Big BAT, gives BATCO the
8 responsibility for coordinating all those
9 responsibilities. BATCO accepts those
10 responsibilities.

11 Attachment 2, Your Honor, is BATCO's
12 chairman's advisory conference. And on page
13 4 of that document, BATCO now -- this is the
14 company that generates the document -- says
15 the meeting, that is, the chairman's meeting
16 of BATCO, endorsed the responsibility
17 delegated by BAT, Big BAT, to BATCO to
18 develop, agree, and coordinate the key
19 strategies for its tobacco activities and
20 agreed the exchange of information necessary
21 to achieve this.

22 So the parent says BATCO, you take care
23 of the tobacco matters for everybody,
24 including the U.S. company; BATCO says we'll
25 do it. We go on, Your Honor, and we see

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1 that BAT did do it.

2 The third document, which is a 1989
3 BATCO document, indicates it is certainly
4 doing it. Paragraph 4. In addition to its
5 direct role in the management and
6 development of its own business, BATCO will
7 also be responsible through the tobacco
8 strategy review team.

9 They've set up a team now for
10 formulating and agreeing with the other
11 tobacco companies, that includes Brown &
12 Williamson, a group-wide R & D program for
13 the preparation of compendiums on smoking
14 issues and for initiating and coordinating
15 meetings and other activities to promote the
16 group's views on these issues. So they're
17 actively doing it.

18 The next document, attachment 4, is
19 another document that states the same thing.
20 The American Tobacco Companies recognized
21 that BATCO was representing B&W.

22 Attachment 5, Your Honor, which is a
23 BATCO document written to Philip Morris. It
24 says to Philip Morris: Two of your
25 competitors are represented on TRC, that's

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1 the English Tobacco Research Committees;
2 American Brand by Gallahers, and B&W by
3 ourselves. BATCO is telling Philip Morris
4 we are representing B&W in tobacco matters.

5 So not only have they told the parent
6 they accept the responsibility; not only are
7 they doing it, they tell the rest of the
8 industry that they're representing B&W on
9 tobacco matters. They actually do it. We
10 know they did it. We know they met with
11 B&W. We know they cooperated with B&W on
12 joint research.

13 Attachment 6 tells us that, Your Honor.
14 That's another BATCO document. The first
15 paragraph says that they're working on a
16 project with different aspects of the work
17 being done in South Hamilton, that's BATCO;
18 Hamburg, that's their German company; and
19 Louisville, that's Brown & Williamson in
20 Louisville, Kentucky. The development
21 follows a meeting in South Hamilton in
22 September involving representatives from all
23 three centers. B&W people come to South
24 Hamilton, meet with the BATCO people,
25 they're exchanging information.

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1 It's an ongoing constant relationship
2 as we see in Exhibit 7, Your Honor, which is
3 attached on page 8. They're talking their
4 need to cooperate, Your Honor, on
5 environmental tobacco smoke.

6 Paragraph 18 on page 8 says, In view of
7 the fast growing importance of environmental
8 smoke, it was agreed there should be close
9 communication on research between GR in
10 D.C., that's BATCO, B&W, Brown & Williamson,
11 Canada and Germany, with regular meetings of
12 experts at not more than six-month
13 intervals.

14 This is a document, Your Honor, which
15 is a BATCO document but you'll notice it was
16 produced by B&W. They had it. They knew
17 it.

18 And finally, Your Honor, Attachment 8,
19 we not only know that everybody knew they
20 were doing it, we know that they actually
21 did it. The B&W people attended the
22 BATCO-sponsored planning meetings which in
23 the English parlance they call structured
24 creativity conferences. Attachment 8 is one
25 of those.

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1 Background. First page says this
2 conference was to bring together key

3 marketing and product application thinkers
4 to stimulate innovative ideas.

5 The third page has the list of
6 participants, Ted Para, Brown & Williamson;
7 Mike Scott from BAT; and other members from
8 BATCO.

9 So, Your Honor, that is an explanation
10 of the chart that's on the left showing that
11 BATCO was in the center. It had the
12 responsibility from the parent. It was
13 coordinating constantly with B&W. It was
14 the agent for B&W on tobacco research
15 matters.

16 It's for that reason, Your Honor, that
17 we have maintained and do maintain that the
18 BATCO documents are admissible against both
19 the parent and against its sister for whom
20 it was given responsibility of
21 representation on tobacco matters and for
22 whom it was responsible to coordinate the
23 research with B&W.

24 That's a long way, Your Honor, of
25 discussing why 943 is admissible, but I hope

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1 it sets the stage for the rest of the BATCO
2 documents throughout this trial.

3 MR. OHLEMAYER: If I may, Your
4 Honor, that's a very eloquent jury argument,
5 but they could have established any or all
6 of that, and I don't know that any of it is
7 true or I agree with any of it. They could
8 have taken 36(b) depositions, they could
9 have served requests for admissions, they
10 could have established through evidence
11 everything they just argued.

12 Every morning they come in here and
13 they argue to you instead of proving
14 evidentiary foundation. And it's all
15 foundation that may or may not exist.

16 We spent six years getting this case
17 ready for trial. They could have sued
18 BATCO. They could have asked people to
19 authenticate these documents, they could
20 have asked people to explain it. They could
21 have asked people who communicated these
22 thoughts, who received these thoughts, who
23 acted upon these thoughts. They haven't
24 done any of that. They come in here every
25 morning and make a jury argument and say

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1 admit this stuff.

2 MR. WESTBROOK: Excuse me, Your
3 Honor. That's not jury argument. I
4 attached the exhibits for everything said
5 and I'll stand by everything said. It's in
6 the documents. It's not my argument.

7 MR. TRINGALI: If I might respond
8 on behalf of BAT Industries. I think the
9 problem here is that they have not sued
10 BATCO. If they had British American Tobacco
11 Company here as a defendant as they have in
12 most of their cases, then they wouldn't have
13 this issue of trying to find someone to pin

14 the British American Tobacco Company
15 documents on so they can get them into
16 evidence. That's what's going on here.
17 They make this argument about BAT Industries
18 delegating everything and, therefore, these
19 are all their documents.

20 The fact of the matter is, Your Honor,
21 you haven't heard Mr. Westbrook make any
22 contrary assertions. None of these
23 documents are written by, sent to, or found
24 in the files of BAT Industries. The only
25 hook he has for BAT is that it's the parent

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1 company and he says because it's the parent
2 company and because, as the parent company,
3 one of its companies is coordinating
4 activities for the other companies, then
5 every document in its files is admissible
6 against the parent. But that isn't the law.

7 You don't admit documents that are
8 found in the files of a subsidiary against
9 the parent. The issue here is that they
10 have not named the person whose documents
11 they want as a defendant, and they're trying
12 to find a hook to get those documents in,
13 and they've now come up with this argument
14 that because there's a parent/subsidiary
15 relationship that any document, even though
16 they haven't shown that the document was in
17 any way communicated to the parent, becomes
18 the admission of the parent. And that's not
19 the law, Your Honor.

20 THE COURT: All right. You have
21 another group prepared, Counselor?

22 MR. WESTBROOK: Yes, Your Honor.

23 THE COURT: For the record, 25028
24 will be admitted. 7129 will also be
25 admitted. 943 will not be admitted at this

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time.

2 (Plaintiffs' Exhibit(s) 25028, 7129
3 received in evidence.)

4 (Plaintiffs' Exhibit(s) 943 not
5 received in evidence.)

6 THE COURT: Go ahead,
7 Mr. Westbrook.

8 MR. WESTBROOK: Thank you, Your
9 Honor. Next we have 9338 and 20461.

10 THE COURT: Did you say 9338?

11 MR. WESTBROOK: Yes, Your Honor.

12 THE COURT: What's the purpose of
13 9338?

14 MR. WESTBROOK: Your Honor, 9338 is
15 a document produced by Brown & Williamson, a
16 research conference, and on page 6, Your
17 Honor, they discuss the position -- their
18 position with respect to environmental and
19 ambient sidestream smoke.

20 THE COURT: This is offered as to
21 whom?

22 MR. WESTBROOK: This is offered as
23 to BAT and as to Brown & Williamson. And
24 this is the document that on page 8

25 discusses the fact that BATCO was going to
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1 have close coordination with Brown &
2 Williamson on environmental tobacco smoke
3 issues.

4 And, Your Honor, the reason I've
5 offered it with 20461 is 20461 is an
6 environmental smoke memorandum by C.I.
7 Ayres, and in the research conference memo,
8 9338, Your Honor, they discuss that very
9 document. And on page 7, paragraph 17, they
10 say the personal paper by Dr. Ian Ayres was
11 regarded as a useful contribution and that
12 it highlighted our need for better knowledge
13 and understanding of the key chemical and
14 biological aspects of environmental tobacco
15 smoke.

16 THE COURT: This is also offered as
17 to BAT and B&W?

18 MR. WESTBROOK: Yes, Your Honor, so
19 these two documents are internally
20 consistent. One refers to the other. They
21 both refer to environmental tobacco smoke.

22 THE COURT: Mr. Ohlemeyer?

23 MR. OHLEMAYER: May I see a copy of
24 the document in the form that they're
25 offering it?

2343

1 MR. WESTBROOK: Sure.

2 MR. OHLEMAYER: This one?

3 MR. WESTBROOK: Yes.

4 MR. TRINGALI: While Mr. Ohlemeyer
5 is looking at the document with regard to
6 BAT Industries, it's the same argument.

7 THE COURT: Same argument?

8 MR. TRINGALI: Yes.

9 THE COURT: That would be to 20461.

10 MR. TRINGALI: It's an internal
11 document to British American Tobacco Company
12 not sent to, found in the files of BAT
13 Industries.

14 MR. MOTLEY: Your Honor, may I add
15 one thing to the record. I know Mr. -- we
16 learned yesterday that there was some event
17 that occurred in the state of Minnesota case
18 with respect to BAT documents. I don't have
19 the details of it yet, but I think it bears
20 on this very issue that we're addressing
21 this morning, 69 new documents were
22 disgorged in some fashion.

23 You may or may not know, BAT
24 Industries, in fact, was sued. There were a
25 bunch of depositions taken in England and

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1 that sort of thing, and at some point in
2 time, once we figure out exactly what did
3 happen yesterday, my information is from the
4 Internet, we may ask Your Honor to revisit.
5 If it makes no difference, we won't.

6 THE COURT: I may revisit this but
7 20461, the same rule would apply, same
8 order. I will not admit.

9 (Plaintiffs' Exhibit(s) 20461 not

10 received in evidence.)

11 THE COURT: Any objection to 9338,
12 Mr. Ohlemeyer?

13 MR. OHLEMAYER: Yes, Your Honor,
14 for the reasons stated before, there is no
15 foundation established that this was
16 communicated to anyone at Brown & Williamson
17 at any point in time that's relevant to the
18 lawsuit, and that it was acted upon or
19 agreed to or discussed or in any other way
20 connected to the conduct of the company as
21 it relates to the issues to be tried in this
22 case. So I'd object to it for lack of
23 foundation, lack of relevance, and under 403
24 its probative value is outweighed by its
25 confusing and time-consuming fact.

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1 MR. TRINGALI: On 9338, if I may,
2 Your Honor, I believe they're also trying to
3 introduce it against BAT Industries. It's
4 the same argument. It's not a BAT
5 Industries document. It's not in their
6 files.

7 THE COURT: 9338, the Court is
8 persuaded should be admitted.

9 (Plaintiffs' Exhibit(s) 9338 received
10 in evidence.)

11 THE COURT: What's the next group
12 Counselor?

13 MR. WESTBROOK: Fortunately I had
14 been flipping by some that have previously
15 been admitted in the notebook.

16 The next document, Your Honor, is 9645.

17 THE COURT: This is offered as to
18 whom?

19 MR. WESTBROOK: This document is
20 offered as to Philip Morris, Your Honor.
21 I've got another copy of it here, Your
22 Honor. It's a 1968 memorandum produced by
23 Philip Morris involving a research meeting
24 of Philip Morris officials on smoking and
25 health and how they're going to approach the

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1 issue of whether they'll continue their
2 policy of vigorous denials, whether they
3 need to do something else when they're
4 dealing with these issues, especially now
5 that as the federal government is becoming
6 more active on it.

7 MR. OHLEMAYER: Your Honor, it's
8 not on letterhead. It is written by one
9 individual at Philip Morris to another
10 individual at Philip Morris. It's entitled
11 "Some Thoughts." There is no evidentiary
12 foundation that these are the thoughts of
13 the company, that these are the actions of
14 the company, or that these were communicated
15 to anyone within or beyond the company. So
16 I think it lacks foundation to establish its
17 relevance to this case. And under Rule 403,
18 even if you found it of marginal relevance,
19 it should be excluded because its probative
20 value is far outweighed by its ability to

21 confuse and mislead the jury.

22 MR. WESTBROOK: Your Honor, it's
23 signed by their research director on the
24 last page. It reports on a Hilton Head
25 meeting they had of the company.

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1 THE COURT: How do I know that's a
2 research director?

3 MR. OHLEMAYER: He is. There's no
4 doubt about that, Your Honor. But my point
5 is, this is a document that says some
6 thoughts. The title says "Some Thoughts."
7 These are his thoughts. And at this point,
8 there is no way to know whether his thoughts
9 were shared by the company. Mr. Goldsmith
10 might have written them a memo back that
11 said you're all wet. That's the kind of
12 evidentiary foundation that's necessary to
13 establish the relevance of the issues in
14 this case.

15 MR. WESTBROOK: At most that goes
16 to the weight. And the title isn't "Some
17 Thoughts." The title begins "Hilton Head
18 Meeting of the Cigarette Company Research
19 Directors."

20 THE COURT: I think that does go to
21 the weight. 9645 will be admitted.

22 (Plaintiffs' Exhibit(s) 9645 received
23 in evidence.)

24 MR. WESTBROOK: Next, Your Honor,
25 is 10513. Hopefully it will be next in

2348

1 order in your notebook. Another Philip
2 Morris document also produced by Philip
3 Morris from a research -- a scientist and
4 researcher to the research director.
5 Mr. Wakeham wrote another document
6 concerning tobacco matters. Also discusses
7 the issue which has been brought up in this
8 case about how asbestos or radioactivity may
9 interact with smoking.

10 THE COURT: Mr. Ohlemeyer?

11 MR. OHLEMAYER: First paragraph
12 says, Your Honor, all the suggestions which
13 are written as titles of proposed studies
14 seem to be relevant to cancer research. I
15 will assume I know what Summers has in mind
16 and that I know the attitude of the tobacco
17 working group. With these assumptions, I'll
18 try to make some constructive comments.

19 I don't see how this has any relevance
20 or probative value in this case. For all
21 the same reasons on the last document, Your
22 Honor, I would object to its admissibility.

23 MR. WESTBROOK: The paragraph on
24 epidemiology states: Aside from the
25 well-known -- occupational synergy is

2349

1 suggested. That is, synergy being the
2 interaction of two proposed carcinogens
3 working together. He continues: Aside from
4 the well-known ones of asbestos, radioactive
5 dusts and gases, Summers believes others

6 should be looked for retrospectively. It
7 shows in 1973 that Philip Morris was aware
8 of the synergy between asbestos,
9 radioactivity, and other carcinogens.

10 THE COURT: 10513 will be admitted.

11 (Plaintiffs' Exhibit(s) 10513 received
12 in evidence.)

13 MR. WESTBROOK: Next, Your Honor,
14 is 12879, a trip report dated 1979 produced
15 by Philip Morris. Reports on a meeting that
16 Dr. Osdene, who Your Honor has heard a lot
17 about, with a German tobacco scientist
18 discussing smoking and health problems.

19 MR. OHLEMAYER: In Germany, Your
20 Honor.

21 MR. WESTBROOK: There's no
22 difference, where they're discussing smoking
23 and health problems.

24 MR. OHLEMAYER: I think at this
25 point in this case there hasn't been any

2350

1 evidentiary foundation established that
2 anything that went on in Germany caused or
3 contributed to cause anything that went on
4 in Mrs. Wiley's world. And I think we're
5 way far afield at this point, Your Honor,
6 and I object to it for all the reasons I've
7 previously stated with respect to the last
8 document.

9 MR. WESTBROOK: Your Honor, we're
10 talking about where Philip Morris went and
11 discussed tobacco and health matters with
12 people worldwide. Philip Morris is a
13 worldwide company. From what source they
14 get their information is irrelevant. The
15 fact is they got the information.

16 MR. WAGNER: Judge, if we're making
17 objections, I have a couple I need to add.

18 THE COURT: Go ahead.

19 MR. WAGNER: Your Honor, this
20 document is replete, again, with double
21 hearsay and it's essentially, if you read
22 through it -- and I know Your Honor hasn't
23 had a chance to read through this, but --

24 MR. MOTLEY: I object to
25 Mr. Wagner, who doesn't represent Philip

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1 Morris, standing up here and hasn't read
2 through a document, just like the last one
3 he stood up here and ranted that it wasn't
4 signed and all that. Before he stands up
5 and makes these representations, I
6 respectfully suggest he ought to read the
7 document. It's not his client, number one.

8 THE COURT: It's offered against
9 all Defendants.

10 MR. WESTBROOK: Philip Morris is,
11 Your Honor --

12 MR. WAGNER: There's a reference in
13 here to my client in the very second
14 paragraph.

15 THE COURT: Go ahead.

16 MR. WAGNER: If you see that RJ

17 Reynolds, that's why I'm making the
18 objections, Your Honor.

19 THE COURT: All right.

20 MR. WAGNER: This document, if you
21 even scan through it, doesn't contain
22 admissions. What it is are opinions and
23 commentary about apparently people who had
24 meetings and they're now talking about what
25 they -- their impressions were of the things

2352

1 that they observed. These are not
2 admissions, Your Honor. And they are
3 conclusions.

4 And just as an example -- and this
5 would be a very prejudicial document, the
6 writer of this document forms the opinion,
7 makes the comment in the second paragraph,
8 if you just look at it, Dr. Koenig felt that
9 RJ Reynolds, through Frank Colby, has been
10 using ICOSI to control the various national
11 associations and so forth.

12 Now, Judge, I mean, there has to be a
13 limit as to what can be admitted here in
14 terms of fact versus fiction, fact versus
15 opinion, fact versus commentary.

16 This is not a document that contains
17 admissions. This is a document that
18 contains impressions, commentary by somebody
19 about what other people think, what other
20 people are doing and that sort of thing.
21 It's certainly not admissible under any
22 basis. It contains double, triple hearsay
23 and everything else.

24 MR. WESTBROOK: Your Honor, first
25 of all, the document is a Philip Morris

2353

1 business record.

2 Second of all, the statements, whether
3 they're true or not, are not offered for the
4 fact that these people are saying the truth.
5 It's offered for the fact that these people
6 were discussing these things at the time.
7 These are the defendants discussing these
8 things at the time internally.

9 In fact, we contend many things they
10 said were untrue, but the truth of it is not
11 what's important in this case. The fact is
12 that they were saying these things and
13 thinking these things and planning these
14 things.

15 MR. WAGNER: All documents are
16 admitted for -- if they're hearsay
17 documents, they have to come in, Your Honor,
18 as an exception to the hearsay rule. If
19 they come in as an exception to the hearsay
20 rule, they're coming in for the truth of the
21 matter asserted in them. They have to have
22 relevancy, have to have basis, have to have
23 something in them that makes them an
24 admission, not some commentary, not some
25 reference to what somebody else said about

2354

1 somebody else about somebody else, Your

2 Honor. Just because it's a Philip Morris
3 document doesn't make it admissible.

4 THE COURT: In my mind, at least at
5 this point, the prejudicial nature of the
6 document outweighs any probative value.
7 12879 will not be admitted.

8 (Plaintiffs' Exhibit(s) 12879 not
9 received in evidence.)

10 MR. WESTBROOK: Next, Your Honor,
11 is 12894.

12 THE COURT: Counselor, how many
13 more numbers are there, do you know?

14 MR. WESTBROOK: I would say there
15 appear to be about ten or so, Your Honor.

16 THE COURT: Ten more? Is it
17 possible we could bring the jury in, start
18 with your witness, and take this up later or
19 do you need this?

20 MR. MOTLEY: Yes, sir. We won't
21 need this until later on today.

22 THE COURT: I appreciate this,
23 because I did make a promise to that jury.

24 MR. MOTLEY: I might make an
25 observation, Judge, that we've been sitting

2355

1 here and I have yet to hear one of these
2 documents, just keeping score, that they
3 don't object to.

4 MR. WAGNER: If you don't bring
5 objectionable evidence in, we don't object.

6 MR. TRINGALI: Your Honor, may I
7 just take one second and ask, with regard to
8 9338, if there would be a limiting
9 instruction so that it not be as to BAT
10 Industries? It's a research conference, the
11 attendees are no one from BAT Industries,
12 again not in their files, not sent or
13 received by them.

14 THE COURT: Mr. Westbrook, you
15 offered that as to BAT and B&W. The request
16 is that it would only be offered to Brown &
17 Williamson.

18 MR. TRINGALI: For the reasons as
19 to each of those others documents. We
20 weren't at the conference.

21 THE COURT: I think that's a fair
22 request. Make that limiting instruction.

23 MR. WESTBROOK: Based on your
24 ruling, Your Honor, yes, we'll do that.

25 THE COURT: Let me ask you again,

2356

1 Mr. Westbrook, 10513 was offered as to whom?

2 MR. WESTBROOK: 10513, Your Honor,
3 Philip Morris.

4 THE COURT: All right.

5 MR. CROSS: If the Court please.

6 THE COURT: Do you have a witness
7 for us, Mr. Cross?

8 MR. CROSS: She is on her way over.
9 It will be just a couple minutes.

10 THE COURT: Who is your first?

11 MR. CROSS: Mary Jane Slaughter.

12 THE COURT: How is the doctor

13 today?

14 MR. MOTLEY: I just sent to find
15 out. I will know, hopefully, in a few
16 minutes. I know he was sick through last
17 night. He didn't have dinner with us.

18 MR. CASSELL: All rise.

19 (Jury present)

20 THE COURT: Be seated. Good
21 morning, ladies and gentlemen.

22 ALL: Good morning.

23 THE COURT: Jury appears in its
24 entirety along with all three alternates.

25 Plaintiffs will call your next witness.

2357

1 MR. CROSS: Your Honor, at this
2 time the plaintiffs would call Mary Jane
3 Slaughter to the stand.

4 THE COURT: All right. Raise your
5 right hand, ma'am.

6 PLAINTIFFS' WITNESS, MARY JANE SLAUGHTER, SWORN

7 THE COURT: Have a seat right over
8 there, would you, please. Would you tell us
9 your name.

10 THE WITNESS: Mary Jane Slaughter.

11 THE COURT: Spell your last name,
12 please.

13 THE WITNESS: S-L-A-U-G-H-T-E-R.

14 THE COURT: Thank you.

15 Mr. Cross.

16 MR. CROSS: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. CROSS:

19 Q Mrs. Slaughter, where do you live?

20 A I live at [DELETED].

21 Q What is your address there in [DELETED]?

22 A Our mailing address is [DELETED].

23 Q And where is [DELETED]?

24 A It's [DELETED].

25 Q How long have you lived at that address?

SLAUGHTER-DIRECT

2358

1 A 34 years, 35 years.

2 Q Were you --

3 A 34 1/2.

4 Q Were you raised in that area?

5 A No. I came from Pennsylvania.

6 Q Are you a little nervous this morning?

7 A I'm very nervous.

8 Q That's quite all right. Everyone who sits
9 up there generally has that same experience.

10 Just take a deep breath and we'll get
11 through this and, hopefully, it won't be
12 quite such an ordeal.

13 I want you to give your answers to
14 these folks over here because they are the
15 ones that need to hear what you have to say.

16 A Okay.

17 Q Where were you -- you were raised as a child
18 in Pennsylvania?

19 A Yes, I was.

20 Q How did you come to Indiana?

21 A I came to Marion to go to college.

22 Q What college was that?

23 A I went to, it was called Marion College at
24 the time. It's Indiana Wesleyan University
25 in Marion, Indiana.

SLAUGHTER-DIRECT

2359

1 Q And did you then graduate from high school
2 in Pennsylvania as well?

3 A I graduated from high school in
4 Pennsylvania, and I went to college about
5 three years.

6 Q Did you get a degree from Marion College?
7 A No, I didn't get a degree. I went from
8 there into nursing school at Methodist
9 Hospital in Indianapolis.

10 Q Are you a married lady?

11 A Yes, I am.

12 Q What is your husband's name?

13 A Wallace Arthur, Jr.

14 Q And have you -- how long have you been
15 married to him?

16 A It will be 36 years in June.

17 Q Okay. When did you go to Methodist -- that
18 was Methodist Hospital in Indianapolis?

19 A That's right.

20 Q When did you go there for nurse's training?

21 A I went there in 1957, in August.

22 Q And is that how long the program is, three
23 years?

24 A It's three years. I graduated in August of
25 1960.

SLAUGHTER-DIRECT

2360

1 Q And what kind of a degree or title did you
2 have after you completed that course?

3 A I have a diploma from a three-year nursing
4 school.

5 Q And what does that entitle you to do?

6 A That entitles me to take state boards and be
7 an RN.

8 Q Did you take the state Boards and become an
9 RN?

10 A Yes.

11 Q What is an RN?

12 A Registered nurse.

13 Q There was a lady that testified yesterday,
14 Marilyn Bardsley. Do you know her?

15 A Yes, I went to nursing school with her.

16 Q At Methodist?

17 A Yes. We were in the same class.

18 Q Now, during the course of your training at
19 Methodist, did you have occasion to -- were
20 there any courses or any educational
21 programs that talked about secondhand smoke
22 or the health hazards that might be
23 associated with it?

24 A No, there wasn't.

25 Q After you graduated in 1960, where did you

SLAUGHTER-DIRECT

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1 A go to work?

2 A I went to work for a month at Marion General
3 Hospital in Marion. And then I went out to
4 VA and applied and got a job there.

5 Q And you worked at Marion General Hospital
6 for one month?
7 A Yes.
8 Q Did you work anywhere else before you went
9 to -- which VA Hospital did you go to?
10 A At Marion.
11 Q Did you ever work in the Indianapolis
12 Veteran's Administration Hospital?
13 A One year. I was at Marion from September of
14 1960 to July, the end of July 1961. And I
15 transferred to 10th Street in Indianapolis.
16 These two years I took some part-time
17 classes at Marion College and then at IU
18 downtown center while I was here in
19 Indianapolis. And then in June of 1962 I
20 got married and transferred back to Marion
21 VA.
22 Q But your first hospital that you worked as
23 an RN was Marion General Hospital?
24 A Yes.
25 Q And that was what year?

SLAUGHTER-DIRECT

2362

1 A 1960.
2 Q Was smoking permitted in the halls of Marion
3 General Hospital?
4 MR. WAGNER: Objection, Your Honor.
5 Relevancy, time, nothing to do with this
6 case.
7 THE COURT: Sustained.
8 Q Why did you seek employment at the Marion VA
9 Hospital if you had a job at Marion General?
10 A I wasn't happy at Marion General.
11 Q Why not?
12 A Because I didn't like the way I was assigned
13 and I thought there was more security at
14 Marion VA with insurance programs and so on.
15 Q Can you explain what you mean by more
16 security?
17 A Well, their benefits, retirement program and
18 insurance and so on.
19 Q Okay. And so you were, if I may take you
20 through this, you were -- from 1962 to 1965
21 you were at Marion; is that right?
22 A Marion VA.
23 Q And just so that we're clear on this, there
24 is another Veteran's Administration Hospital
25 in Indianapolis, is there not?

SLAUGHTER-DIRECT

2363

1 A At the time when I was there, there was only
2 10th Street, although they did have a longer
3 term care. Goodness, I can't remember
4 exactly where it was. That was sort of part
5 of the hospital. It was for long-term care
6 patients.
7 Q But there was a complex of --
8 A It was Cold Springs Road. It just came into
9 my mind.
10 Q So there were some -- there were hospitals
11 or a hospital in Indianapolis that was
12 administered by the Veteran's
13 Administration --

14 A Yes.
15 Q -- in addition to the one in Marion.
16 A Yes.
17 Q Okay. So from 1965 to 1973, I think you
18 gave us a brief course on what you did.
19 Let's -- while you were -- that 1962 to 1965
20 period that you were at the Marion VA
21 initially, what kind of work did you do
22 there?
23 A I was an RN.
24 Q And were you assigned to a specific
25 building? What were your duties?

SLAUGHTER-DIRECT

2364

1 A I was a staff nurse on several buildings,
2 because they would make changes in the way
3 they ran the hospital, and for the most part
4 I was assigned to one unit which consisted
5 of about four different buildings. And the
6 patients at that time were placed according
7 to like admissions and then we would send
8 them out from admissions to the appropriate
9 other three buildings that they would fit
10 into for their needs.
11 Q And why did you come to leave the VA in
12 1965?
13 A Because we had been in a tornado in -- Palm
14 Sunday tornadoes, and I had a lot of
15 traumatic stress. And the end of December
16 there were a lot of stormy nights that whole
17 year, and I was sort of very nervous, and I
18 stopped working.
19 Q But you came back to the Veteran's
20 Administration in the year 1973; is that
21 right?
22 A Yes.
23 Q What did you do in those intervening years,
24 1965 to 1973?
25 A After my second son was born in September of

SLAUGHTER-DIRECT

2365

1 '66, I -- my husband was laid off or was --
2 the union had gone on strike, where he
3 worked at Haynes Stellite in Kokomo, and I
4 went back to work full-time until the strike
5 was over, which was about the end of
6 December. So I worked about six weeks, I
7 suppose, on full-time. And then I went to
8 part-time until spring of '68 when our third
9 son was born.
10 Q What hospital was that?
11 A That was at Howard Community Hospital in
12 Kokomo.
13 Q Howard County Community Hospital?
14 A Howard Community Hospital.
15 Q And that's in Kokomo?
16 A Yes.
17 Q Okay. Was there smoking permitted on the
18 floor of --
19 A Yes, there was.
20 MR. WAGNER: Excuse me, Judge.
21 Move the answer go out for purposes of
22 making an objection. Irrelevant.

23 THE COURT: Objection sustained.
24 The answer will go out and the jury will
25 disregard.

SLAUGHTER-DIRECT

2366

1 Q You started working part-time in 1968?
2 A Yes. Then after our son was born in, like,
3 August, I believe it was, I went to St.
4 Joseph Hospital in Kokomo and started
5 working part-time there until 1973.
6 February.
7 Q Let me just, in order to save the Court some
8 time, let me just ask you this question: Up
9 until, let's say, the late 1980 --
10 Let me ask you this. When did you
11 retire from the nursing profession?
12 A In 1992.
13 Q And up until that time -- let's take it to
14 just before that time. Let's say up until
15 the late 1980s, at any event, were you aware
16 of any hospital anywhere that prohibited
17 smoking in --
18 MR. WAGNER: Objection, Your Honor.
19 No foundation.
20 THE COURT: Sustained.
21 MR. MOTLEY: Your Honor, may I
22 approach?
23 THE COURT: All right.
24 (Bench discussion)
25 THE COURT: Go ahead, Counselor.

SLAUGHTER-DIRECT

2367

1 MR. CROSS: Thank you, Judge.
2 Q Okay. You're working at St. Joseph's
3 Hospital. Are you part-time working there?
4 A I worked there part-time, and I gradually
5 increased the time I worked until I was
6 working instead of being full-time with ten
7 days' pay period, I was working nine.
8 Q And how long -- how long did that last?
9 A That lasted until February of 1973.
10 Q And you went back to the Veteran's
11 Administration at that point in time?
12 A I went back to the Veteran's Administration
13 late February of 1973.
14 Q And can you tell this jury why you went back
15 to the Veteran's Administration?
16 MR. WAGNER: Well, Your Honor,
17 objection. Mental processes, motivation.
18 MR. CROSS: Absolutely not, Your
19 Honor. She is a factual --
20 THE COURT: She's already touched
21 upon that. But go ahead generally, why did
22 you go back.
23 A I went back to VA because of the oil crunch
24 and the economy didn't look good, and I
25 decided I was going to go back to VA because

SLAUGHTER-DIRECT

2368

1 of finances. I was afraid my husband's job
2 would not be secure, and needed to go back
3 to VA because of the benefits and the pay.
4 Q You had occasion to talk with a lot of

5 nurses during your day-to-day employment
6 activities, did you not?
7 A Yes.
8 Q And were you generally aware of the various
9 current events, if you will, that were going
10 on with regard to the nursing profession in
11 those years?
12 A Yes.
13 Q And were you aware of the employment
14 opportunities available for nurses in the
15 year 1973?
16 MR. WAGNER: Excuse me. That's a
17 yes or no answer, Judge.
18 THE COURT: You can answer that yes
19 or no.
20 Q Let me repeat the question, Mrs. Slaughter.
21 Were you aware, generally speaking, of the
22 employment opportunities available for
23 nurses in central Indiana in the year 1973?
24 A Yes, I was.
25 Q And what was the -- what was the source of

2369

2370

1 ones were being laid off. And I had some
2 nurses asking me, and I --
3 MR. WAGNER: Excuse me, Judge,
4 hearsay.
5 THE COURT: We don't want you to
6 tell us what other nurses may have told you
7 but I think you've generally answered his
8 question, ma'am. Thank you.
9 Q So if I may paraphrase -- how would you
10 describe the employment opportunities, the
11 job market for nurses in the mid- to late
12 '70s?
13 MR. WAGNER: Excuse me, Your Honor

14 You know, there is no foundation here. The
15 witness just answered the last question of
16 Mr. Cross with respect to the 1980s, a
17 period of time not particularly relevant in
18 terms of what we're talking about.

19 THE COURT: I'm not sure it's
20 relevant, the last question. Let's move on,
21 Mr. Cross.

22 Q Were you concerned about your job security
23 in 1973?

24 MR. WAGNER: Objection, Your Honor,
25 as to this witness' concern. It's not

SLAUGHTER-DIRECT

2371

1 relevant.

2 MR. CROSS: It absolutely is, Your
3 Honor.

4 A I'm sorry I got into the wrong --

5 MR. CROSS: Just a minute. It goes
6 to whether -- it goes to the basis of why
7 Mildred Wiley went there too. She was a
8 registered nurse just like this lady, they
9 both went to the Veteran's Administration
10 Hospitals.

11 THE COURT: Are you talking about
12 her job security at Marion VA?

13 MR. CROSS: Yes.

14 THE COURT: If you are, you can ask
15 her that.

16 A I'm sorry. I got the wrong decade. It was
17 in the mid-'70s that Medicare did this. And
18 I'm sure --

19 MR. WAGNER: Your Honor, please.
20 The witness is volunteering. This is not --
21 there's no question before the witness here.

22 THE COURT: If she wants an
23 opportunity to correct her last answer, she
24 may have that.

25 Now, the answer that you gave regarding
SLAUGHTER-DIRECT

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1 nurses being laid off, did you mean that to
2 apply to the '70s or '80s?

3 THE WITNESS: That's right. I was
4 confused.

5 THE COURT: Which should it apply
6 to?

7 THE WITNESS: It was in the '70s.
8 About '75, '74, '75.

9 THE COURT: All right. Now the
10 next question he's asked you regarding your
11 job security at Marion VA. Were you
12 concerned about your own job security at
13 Marion VA?

14 A No. That's why I went to Marion VA. And
15 I'm sure that's why Mrs. Wiley went there.

16 Q Thank you.

17 MR. WAGNER: Judge --

18 THE COURT: The last as to after
19 she said I'm sure that's why Mrs. Wiley went
20 there will go out. The jury will disregard
21 that.

22 I'm going to tell you, ma'am, I just

23 want you to answer the questions. Don't
24 volunteer anything.

25 THE WITNESS: Okay.
SLAUGHTER-DIRECT

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1 THE COURT: Go ahead, Mr. Cross.
2 MR. CROSS: Thank you.

3 Q Would you tell this jury why you felt that
4 going to the VA Hospital job offered you
5 security.

6 MR. WAGNER: Judge, it asks for
7 mental process of this witness and her
8 motivation.

9 THE COURT: I think she's answered
10 that, Counselor, in terms of security.
11 Let's move on.

12 Q So was it 1973 or 1974 that you returned to
13 the Veteran's Administration?

14 A I returned in February of 1973.

15 Q Where were you assigned when you returned?

16 A I was assigned to Building 16.

17 Q What kind of hospital ward or whatever was
18 Building 16?

19 A It was chronic psychiatric patients and also
20 some with some medical disabilities.

21 Q How long did you work in Building 16?

22 A I worked there from 1973 until I retired in
23 1992.

24 Q So that would have been 19 --

25 A 19 years.

SLAUGHTER-DIRECT

2374

1 Q Were these older patients or younger
2 patients or a mix of both that you treated
3 there?

4 A At first it was a mix of both and gradually
5 as the patient population got more
6 debilitated, we got more and more
7 debilitated patients.

8 Q Over what time frame did this transformation
9 occur?

10 A The whole 19 years.

11 Q And were these all veterans?

12 A Yes.

13 Q And when you say "chronic," I think you used
14 the word "chronic patients"?

15 A Chronic psychiatric patients.

16 Q Describe for the jury, please, what your
17 understanding of the chronic psychiatric
18 patient was.

19 A I would say they are long-term psychiatric
20 patients who didn't respond well enough to
21 leave the hospital with medication.

22 Q Were these people basically permanently
23 institutionalized as a result of their
24 condition?

25 A It always sort of appeared that way, but our
SLAUGHTER-DIRECT

2375

1 goal was to get them back to the community
2 if we could.

3 Q And what degree of success did you have
4 generally speaking?

5 A There were some who we managed to discharge.
6 A lot of them would go to other facilities,
7 like nursing homes. Or some of them might
8 even -- early on they used to have like a
9 community residence program where patients
10 could go live in the community, like group
11 homes. But it was set up with individuals
12 who owned their home and would sort of room
13 and board these patients.

14 Q Can you describe for the jury generally what
15 you did, what your duties were, the
16 positions you occupied during the 19 years
17 you worked in Building 16.

18 A When I first went there, I worked on evening
19 shift. I was the only RN on evening shift.
20 And I had nursing assistants. There was
21 three floors. The first few months they
22 were remodeling the first floor, so we sort
23 of had more patients on up on the other
24 wards. We sort of moved them together. And
25 then after a few months we had all three

SLAUGHTER-DIRECT

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1 floors occupied by these patients. And I
2 was in charge of all three floors and did
3 the RN duties and supervised the nursing
4 assistants.

5 And at that time I also supervised four
6 other wards where there was an LPN who did
7 the medications and so on.

8 Q And did those duties change over the years?
9 A Gradually they changed. They reduced the
10 patient load, and so it ended up that I
11 was -- well, I don't think they completely
12 got back to just Building 16 while I was
13 evenings, because I changed and went on days
14 for a couple of years because my husband had
15 to -- well, I worked evening shift for about
16 five and a half -- it was about five and a
17 half years when he was laid off at Stellite
18 in Kokomo. And he was off for six months.
19 And then he got a job at Chrysler
20 Transmission Plant. And after working one
21 week he had to go on evening shift, which I
22 was on.

23 And in order to take care of our boys
24 at home, I went to day shift, and I was on
25 day shift and did all the midnight relief

SLAUGHTER-DIRECT

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1 for the nurse that would be off who was
2 doing the midnight duties. And I would take
3 her days off. So I worked day shift three
4 days a week and was on nights two days a
5 week for two years. And then I went on
6 night shift full-time.

7 Q What approximate year was this?

8 A That would have been apparently about '81, I
9 believe.

10 Q Okay. And then what happened?

11 A Then I went on full-time night shift I think
12 for about two years with the night relief
13 again. And then I went on full-time nights

14 again for the rest of my employment.
15 Q When did you first meet Mildred Wiley?
16 A When she came to work at VA, I believe it
17 was the summer of 1993.
18 Q 1993?
19 A I believe so.
20 Q Think hard. 1993?
21 A I'm sorry. No. It was in 1973.
22 Q That was just a few months after you started
23 there?
24 A Yes.
25 Q This was in -- she worked in Building 16,
SLAUGHTER-DIRECT

2378

1 did she not?
2 A That's right.
3 Q And you were still working in Building 16 at
4 the time of her death, were you not?
5 A Yes, I was.
6 Q So you were there before and after her?
7 A Yes.
8 Q The entire time she was there?
9 A Yes.
10 Q Can you tell this jury what you observed
11 personally about the practice of people
12 smoking in Building 16 during that time
13 period.
14 A The patients were allowed to smoke and
15 employees both. The patients who could not
16 manage their own cigarettes, the ones who
17 smoked, which was almost all of them, were
18 given cigarettes by the staff that had been
19 purchased for them and stored on the ward
20 about every two hours. Sometimes we had to
21 hold their cigarettes for them. We always
22 had to light their cigarettes.
23 Q Why was that?
24 A Because they weren't allowed to carry
25 matches.

SLAUGHTER-DIRECT

2379

1 Q So the nurses carried matches?
2 A Yes. Or we had them in -- available there
3 where we kept the cigarettes where we would
4 get them for them.
5 Q Were there -- you kept the cigarettes in the
6 ward?
7 A Yes. We stored them in the ward in what we
8 call the canteen. It was cabinets that we
9 locked their cigarettes in. And each day we
10 would give each patient a package of
11 cigarettes according to which ones they had
12 in the canteen.
13 And we would take their cigarettes, a
14 pack of cigarettes out a day each day and
15 put it in a box. And then when every
16 patient -- when the patients were given
17 cigarettes, it was -- their cigarette was
18 removed from their package and given to
19 smoke.
20 Q So the patients did not get to keep the pack
21 of cigarettes during the day?
22 A It depended on the patient, whether they

23 were trustworthy. Some of the patients
24 might carry their cigarettes. Other ones
25 who couldn't, we kept them in the box.

SLAUGHTER-DIRECT

2380

1 Q And were there any patients on the floor
2 that did not smoke?
3 A There were very few.
4 Q And what did -- did they receive any kind of
5 distribution of anything from the canteen
6 while the other people were getting their
7 cigarettes?
8 A Well, if they wanted them, they would have
9 candy bars available which would be in
10 there. We had a bin for each patient in the
11 canteen. It would be in their bin and we
12 would get it out and give it to them when we
13 passed out the canteen.
14 Q Were these the same bins or whatever that
15 the cigarettes were stored in?
16 A Yes.
17 Q So some bins had cigarettes and some bins
18 had candy bars?
19 A That's right.
20 Q Did you observe any of the staff of the
21 hospital smoking in Building 16?
22 A Almost all of them did.
23 Q And would that include the nursing staff?
24 A Some of them. Yes. The nursing assistants
25 and the RNs.

SLAUGHTER-DIRECT

2381

1 Q Would that include the physicians?
2 A Usually the physicians, if they smoked, they
3 smoked in their offices.
4 Q But they smoked?
5 A Yes, some of them did.
6 Q How was the building heated?
7 A It was steam heat, steam radiators, hot
8 water radiators.
9 Q And did this, the smoking, did it go on all
10 day?
11 A Yes, from about 6:00 in the morning until
12 the patients went to bed. Some patients who
13 were privileged or who were more mentally
14 alert who didn't want to go to sleep or
15 couldn't go to sleep at 8:00 or 9:00, they
16 would be up and watch television in the day
17 room and smoke maybe until 10:00.
18 Q Did the -- when the people smoked -- let's
19 go back. You say it started about 6:00?
20 A Yes. When they got up in the mornings.
21 Q And did the smoking -- did they smoke in
22 their bedrooms?
23 A No, they got up and got their clothes on and
24 went to the day room and smoked.
25 Q How many people would do that customarily?

SLAUGHTER-DIRECT

2382

1 A It depends on the condition of the patients
2 on the wards. For the patients on third
3 floor were ambulatory, probably most all of
4 them would smoke a cigarette before they

5 would go down to breakfast.
6 Q Most of them got up around 6:00 in the
7 morning?
8 A That's right.
9 Q Were there any chain smokers on the floor
10 that you observed?
11 A I'm sure there were some chain smokers. I
12 can't recall any names at this time, but the
13 ones who were privileged and carried their
14 own cigarettes, they would smoke as much as
15 they wanted to.
16 Q When this smoke would be generated from the
17 patients and the staff smoking on the floors
18 of Building 16, how long would it take for
19 it to dissipate?
20 A It would take a long time. Because it was
21 so constant, it's hard to say how fast it
22 would dissipate. But like when they would
23 come back from breakfast and they were all
24 smoking at the same time, it would take a
25 long time to clear out all that smoke so you

SLAUGHTER-DIRECT

2383

1 can see without a fog being above your head
2 or down to your head.
3 Q When you were working third shift, did there
4 come a time during the -- third shift is
5 nights; right?
6 A That's right.
7 Q From when to when roughly?
8 A Excuse me?
9 Q What time to what time?
10 A 12:00 midnight to 8:00 in the morning.
11 Q And during that time period did the smoke
12 ever go completely away?
13 A I suppose while the patients were sleeping
14 it wasn't -- you know, the smell was always
15 there.
16 Q Did it ever go completely away? Did the
17 smell ever go completely away?
18 A No.
19 Q Were there fans or anything like that in the
20 building during your time there?
21 A On third floor there was a large exhaust fan
22 about three feet in diameter up near -- up
23 near the ceiling on the wall. And on the
24 other side of the room there was a smaller
25 fan. I suppose it was maybe 18 inches that

SLAUGHTER-DIRECT

2384

1 was an exhaust fan, but it didn't take care
2 of that much smoke.
3 Q Did they run the fans all year round?
4 A No. They would just turn them on whenever
5 it got really smokey. And then there were
6 always -- also fans on the walls in
7 different areas that would move the air
8 around, but they weren't exhaust fans.
9 Q Did there come times during the winter when
10 they would turn the fans off?
11 A Yes, when it was cold.
12 Q Why would they turn the fans off when it was
13 cold?

14 A Because it would get too cold in there. The
15 patients would complain to personnel that it
16 was too cold.
17 Q And the fans running would make that happen?
18 A Yes.
19 Q Do you recall during this time period
20 attending staff meetings at the hospital in
21 Building 16?
22 A Yes.
23 Q What were these staff meetings?
24 A Well, they had staff meetings, like when the
25 day shift came in, they would have a meeting

SLAUGHTER-DIRECT

2385

1 to discuss what needed to be done during the
2 day or what -- if there was any policies or
3 anything changed that needed attention right
4 then. They would relay this to the
5 personnel on day shift, and once a week the
6 night shift was included in a staff meeting
7 with the day shift in the break room. And
8 it was for the same purposes, communication
9 between all the nursing employees.

10 Q And you may have said this, but I didn't
11 catch it if you did. Would these meetings
12 take place at the same time every day?

13 A Yes.

14 Q What time was that?

15 A The night shift people would come into work
16 at 7:30, and they would all meet in the
17 break room. And on the mornings that night
18 shift met with them, anytime after 7:30 we
19 would try to get there for a meeting.

20 Q Would these -- did you attend all these
21 meetings on a regular basis?

22 A Yes.

23 Q And did they occur pretty much as you
24 described them throughout the time you
25 worked there?

SLAUGHTER-DIRECT

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1 A No. That was -- that was -- I don't even
2 know how long. The meetings between the
3 employees when they came on duty was pretty
4 much of the time. With the two shifts
5 together, oh, I suppose it was the last -- I
6 think the head nurse before Millie did that.
7 I think it was about seven years, I suppose.

8 Q Did Millie Wiley attend any of these
9 staffings, to your knowledge?

10 A Yes. She was the head nurse, so it was her
11 meetings.

12 Q And she conducted them then?

13 A Yes.

14 Q I think there's been some testimony that she
15 became a head nurse around the year 1985.
16 Would that comport with your memory?

17 A Somewhere around there, uh-hum.

18 Q So from that point, the last six years, she
19 would conduct these staff meetings?

20 A Yes.

21 Q Now, was there smoking taking place in these
22 meetings?

23 A Yes. The employees, all the employees that
24 smoked, smoked at that time.
25 Q And the room where these staff meetings took
SLAUGHTER-DIRECT

2387

1 place, was it ventilated very well?
2 A No. It had a wall fan. It didn't have an
3 exhaust fan.
4 Q So it just blew the smoke around?
5 A Yes.
6 Q How did the smoke affect you?
7 A It made me cough.
8 Q Did you take any reminders of the smoke home
9 with you in the evenings or the mornings
10 when you went home?
11 A Oh, yes. I was saturated with smoke, my
12 hair, my clothes. I go from my garage into
13 the utility room and take my uniform off
14 right there. And then I would shower, wash
15 my hair.
16 Q Was that true the entire time period that
17 you worked there?
18 A Yes.
19 Q Now, did you ever participate in the process
20 of getting into the bins in the canteen and
21 the ward to take out cigarettes or candy
22 bars for the patients?
23 A Yes. When I was on day shift, I did that.
24 Q And did you have occasion in so doing to
25 observe what kinds, what brands were being
SLAUGHTER-DIRECT

2388

1 smoked in the hospital ward of Building 16?
2 A Yes, because each patient had their brand of
3 cigarettes.
4 Q Can you tell this jury what some of those
5 brands were?
6 A There were Camels, Chesterfield, Lucky
7 Strike, Kent, Old Golds, Marlboros, Kools,
8 Salems, Pall Malls, Philip Morris, and they
9 had a generic brand, too, that wasn't
10 labeled any particular brand. It was back
11 when we had all the generic foods, it was in
12 plain white wrappers, and it was generic
13 cigarettes.
14 Q Mrs. Slaughter, you were looking as you were
15 giving that, you were looking at a piece of
16 paper in your hand, were you not?
17 A Yes.
18 Q As you sit here today, you don't have an
19 absolutely perfect memory of everything that
20 you have seen or thought about concerning
21 this subject in the past, do you?
22 A Well, I'm like anybody else. I recollect
23 some things and other things I have to think
24 about. So I prepared a list as I thought
25 about it at home.
SLAUGHTER-DIRECT

2389

1 Q And this is a list that was identified and
2 submitted as a Deposition Exhibit 3 to
3 your -- in your deposition which was taken
4 last -- or in 1994, I believe; is that

5 correct?
6 A That's right.
7 Q I'd ask you to look at that list that you
8 have there, Deposition Exhibit 3, and I'd
9 ask you to look at the next to the last item
10 on that list. I don't think you mentioned
11 that one.
12 A Winston.
13 Q You saw Winstons being smoked in the
14 hospital?
15 A Yes.
16 Q And your testimony to this jury is that you
17 saw each and every one of those brands being
18 smoked in the Veteran's Administration
19 Hospital in Building 16 during the years
20 1973 to 1991 when Mildred Wiley worked
21 there?
22 MR. WAGNER: Leading and
23 suggestive.
24 A That's right.
25 THE COURT: She can answer that.

 SLAUGHTER-DIRECT

2390

1 What was your answer?
2 THE WITNESS: I said that's right.
3 Q Thank you. Now, you were -- you, as I
4 remember, submitted to two different
5 depositions in this case, did you not?
6 A Yes, I did.
7 Q When was the first deposition that you gave?
8 A December 1994, I believe.
9 Q And you gave another deposition when?
10 A I believe it was August of '97.
11 Q How long did the first deposition go?
12 MR. WAGNER: Your Honor, objection.
13 Irrelevant.
14 THE COURT: How is that relevant?
15 Sustained.
16 Q Do you recognize any of these gentlemen at
17 the table as having been at your deposition?
18 A I don't recall.
19 Q Okay. During that deposition you were asked
20 many, many questions about your knowledge of
21 cigarette smoking and secondhand smoke and
22 direct smoking, were you not?
23 MR. WAGNER: Your Honor, I think
24 this is improper direct examination. It's
25 irrelevant, anticipatory.

 SLAUGHTER-DIRECT

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1 MR. CROSS: Your Honor, may we
2 approach?
3 THE COURT: Well, I don't think
4 that's necessary, Counselor. The last
5 objection is sustained. Let's move on.
6 Q During the time that you were a nurse, did
7 you ever receive any continuing education?
8 A Yes. We had classes that gave us education
9 on many subjects.
10 Q And was this a continuing process from the
11 year -- during your second stay at the VA
12 Hospital from 1973 to your retirement in
13 '92, was this true all the time, you were

14 getting additional courses?
15 A There would be like seminars, yes.
16 Q It was a regular activity for nurses?
17 A No. It was scheduled by nursing education,
18 and they would tell us to go to certain
19 meetings for -- that was educational
20 meetings.
21 Q And you were required to attend these
22 courses from time to time?
23 A Yes.
24 Q During this educational process, did you
25 ever receive any training or education or

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1 information concerning the health hazards
2 posed by secondhand smoke?
3 A No, we did not.
4 Q During your entire tenure at the Veteran's
5 Administration Hospital, did you ever
6 receive any bulletins or information or
7 advisories from the Veteran's Administration
8 as to health hazards of secondhand smoke?
9 A No, we didn't.
10 Q And during that same period, up until the
11 time that Millie Wiley died, did you ever
12 receive any information yourself as to the
13 hazards of secondhand smoke?
14 A No, I didn't.
15 Q During this same time period, did you
16 attempt to keep up on what was going on in
17 the nursing profession?
18 A Yes.
19 Q From 1973 to 1991 did you read journals,
20 nursing magazines, anything of that nature?
21 A Yes.
22 Q What were some of the publications you might
23 have read?
24 A Most of it would be on patient care.
25 Q Did you ever read any of these that had as

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1 their subject matter health hazards of
2 secondhand smoke?

3 MR. WAGNER: Objection, Your Honor,
4 as to what this witness may or may not have
5 read that pertains to that subject. It's
6 not relevant.

7 THE COURT: Overruled. You can
8 answer that.

9 A Please state the question again.
10 Q Was the subject matter of any of these
11 journals or publications that you read in an
12 attempt to keep current on what was going on
13 in your nursing profession from 1973 to 1991
14 a concern with the health hazards of
15 secondhand smoke?
16 A No.
17 Q Do you believe -- strike that.
18 What would be your belief as to the
19 extent to which you, as a nurse, would have
20 had knowledge of such matters concerning
21 health as opposed to someone who was merely
22 a member -- a lay person who was not in your

23 profession?

24 MR. WAGNER: Well, objection, Your
25 Honor. No foundation, irrelevant.

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1 THE COURT: I'm going to ask you to
2 rephrase that question. I know where you're
3 going here, but I want you to rephrase it.

4 Q People who are -- let me do it this way:
5 Mrs. Slaughter, do you think that, in
6 general, you kept up on current affairs in
7 the nursing profession as much as other
8 nurses?

9 A Yes.

10 Q Do you think that other nurses generally
11 exercised the same amount of continuing
12 interest in that subject as you did?

13 A You mean continuing education?

14 Q Yes.

15 A Yes.

16 Q Do you feel like you were about -- do you
17 think you were all doing about the same in
18 terms of keeping up on new trends and new
19 affairs?

20 MR. WAGNER: Excuse me. I didn't
21 mean to interrupt. This witness doesn't
22 have foundation as to what every other nurse
23 may have known.

24 THE COURT: You can answer that. I
25 think the question was, generally did you

SLAUGHTER-DIRECT

2395

1 all have about the same level of continuing
2 education.

3 A Yes. They tried to keep us abreast on
4 updates in nursing, from nursing education,
5 and I'm sure that a lot of us -- I did. I
6 got magazines pertaining to nursing to keep
7 up with our profession.

8 Q Now, what did your husband do?

9 A He was a factory worker.

10 Q Did he keep abreast of recent changes in
11 health and nursing as you did?

12 MR. WAGNER: Well, Your Honor. Now
13 we're really far afield.

14 THE COURT: Sustained.

15 Q Then let me ask the question that goes to
16 the heart of it, Mrs. Slaughter. Do you
17 believe that you, as a nurse who kept up
18 with continuing education and kept current
19 in affairs by reading journals and
20 periodicals and so forth, did you have a
21 better knowledge and understanding of
22 current status of health affairs than the
23 average person, than a lay person?

24 MR. WAGNER: Objection. No
25 foundation. It's irrelevant also as to that

SLAUGHTER-DIRECT

2396

1 kind of an opinion coming from a lay
2 witness, and there is no foundation laid
3 here.

4 THE COURT: Sustained.

5 Q Limiting your answer to just members of your
6 profession, the nursing profession, you
7 believe that you were as educated and
8 familiar with the current affairs in nursing
9 and health care as any other member of your
10 profession during the time period you worked
11 at the VA?

12 A I believe I was.

13 Q Let me just ask you this question then:
14 When was the first time that you had an
15 awareness in your life that secondhand smoke
16 had the potential to cause lung cancer?

17 MR. WAGNER: Objection as to what
18 this witness may or may not have known.
19 It's not relevant.

20 MR. CROSS: It certainly is, Your
21 Honor. Their defense is that Mildred Wiley
22 knew and should have known better, should
23 have got another job. And this witness is
24 her contemporary, had the same education,
25 was there during the same period, had the

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1 same continuing education and knowledge and
2 if she didn't know, Mildred Wiley didn't
3 know, and it's probative and we should be
4 allowed to go into it.

5 THE COURT: Mr. Ohlemeyer.

6 MR. OHLEMEYER: For the record,
7 Your Honor, I'd move to strike Mr. Cross'
8 characterization of our defense. There will
9 come a time when we will get to present our
10 defense and I think Mr. Cross shouldn't be
11 telling the jury what he thinks our defense
12 is.

13 MR. CROSS: Does he want to
14 stipulate that is not their defense? I'll
15 be happy to move on.

16 MR. WAGNER: We object to
17 Mr. Cross' comments, Your Honor.

18 THE COURT: The last objection is
19 sustained.

20 You may want to rephrase that,
21 Counselor.

22 MR. CROSS: Might I have just a
23 moment?

24 Q Mrs. Slaughter, when was the first time that
25 you had an awareness that secondhand smoke

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1 could cause fatal lung cancer?

2 MR. WAGNER: Objection, Your Honor,
3 as to what this witness may or may not know.
4 It's not relevant.

5 THE COURT: I'll allow it. You may
6 answer.

7 A My first knowledge was when Mrs. Wiley died.

8 Q And what year was that?

9 A 1991.

10 Q Do you recall giving a contrary opinion
11 during your deposition in 1994?

12 MR. WAGNER: Well, now, I'm going
13 to object.

14 THE COURT: Objection is sustained.
15 MR. CROSS: Do I take it that that
16 subject matter is not to be explored during
17 the course of her testimony?

18 THE COURT: You take it I sustained
19 the last question.

20 Q Would you describe for the jury your
21 personal relationship with Mildred Wiley.

22 MR. WAGNER: Judge, I believe this
23 is all cumulative again if we're going down
24 this road. We've heard this from four or
25 five, six witnesses.

SLAUGHTER-DIRECT

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1 MR. CROSS: I don't think the
2 testimony will take as long as Mr. Wagner's
3 objection, Your Honor.

4 THE COURT: Tell us generally,
5 ma'am, were you close friends with Mrs.
6 Wiley?

7 A We were friends, especially while we were
8 working. And there was not really a social
9 relationship except we knew each other, and
10 I have been at her home one time. And I
11 would see her at different church functions,
12 and we would speak. And I met her husband.

13 THE COURT: All right.

14 Q Did you ever have any conversations with
15 Mildred Wiley about the health hazards of
16 secondhand smoke?

17 MR. WAGNER: Objection, Your Honor.
18 Hearsay.

19 MR. CROSS: That's a yes or no,
20 Your Honor.

21 THE COURT: You can answer that yes
22 or no.

23 A Would you rephrase it.

24 THE COURT: Did you talk to Mrs.
25 Wiley about secondhand smoke. You can

SLAUGHTER-DIRECT

2400

1 answer that yes or no.

2 A Yes.

3 Q Did you ever talk with Mrs. Wiley about the
4 health hazards of secondhand smoke and the
5 possibility that it could cause fatal
6 disease?

7 A No.

8 MR. WAGNER: Your Honor, move the
9 answer go out. Calls for hearsay, Your
10 Honour.

11 MR. CROSS: It's yes or no.

12 MR. WAGNER: What's happening here
13 is counsel is interjecting in his question
14 the subject matter which then calls for a
15 hearsay yes or no answer.

16 THE COURT: Objection is overruled.

17 Your answer was, ma'am? What was your
18 answer to the last question?

19 THE WITNESS: I said -- I think I
20 said yes. Rephrase that question.

21 Q I'll be glad to ask that question again.

22 A If I can remember the question.

23 Q Did you ever have any conversations with
24 Millie Wiley about the health hazards of
25 secondhand smoke and in particular whether
SLAUGHTER-DIRECT

2401

1 or not it could cause fatal lung cancer?

2 A No.

3 Q Thank you. Are you familiar -- in working
4 with her in the same environment for that 17
5 years she was there, did you have occasion
6 to observe whether or not she was taking the
7 same continuing education courses you were?

8 A No. There were different times when there
9 would be nursing education courses. And all
10 the nurses could not leave the wards at the
11 same time. Some of the courses would be
12 repeated, and they would try to get
13 everybody included. And then other times
14 she would get to some of them and I would
15 get to some of them.

16 Q But you were aware that she was taking
17 courses throughout that time period?

18 A Yes. She would take the available -- go to
19 the available meetings and courses on
20 nursing education subjects.

21 Q You understood that she had -- that she was
22 a registered nurse?

23 A Yes, she was.

24 Q And you understood that she was a head nurse
25 for a long period of time, I believe you
SLAUGHTER-DIRECT

2402

1 said?

2 A Yes, she was.

3 Q Based on your education and your knowledge
4 of Mildred Wiley's education, based on your
5 experience together over that 17 years or
6 whatever it was at the Veteran's Hospital in
7 Building 16, what reasons, what possible
8 reasons can you give this jury as to why a
9 registered nurse would continue to work in a
10 smoke-filled environment if it was known
11 that secondhand smoke could cause fatal lung
12 disease?

13 MR. WAGNER: Judge, we object. No
14 foundation.

15 THE COURT: Sustained.

16 MR. WAGNER: Thank you.

17 Q Did Mrs. Wiley, to your knowledge, take care
18 of herself physically?

19 A Yes, she did.

20 Q Do you know whether she observed her diet?

21 MR. WAGNER: Well, no foundation,
22 Your Honor.

23 MR. CROSS: It's a yes or no.

24 A Yes, she did.

25 Q And do you know what -- did you personally
SLAUGHTER-DIRECT

2403

1 observe what measures she might have taken
2 to care for herself?

3 A She just --

4 MR. WAGNER: Excuse me. There has

5 to be a foundation laid here, Your Honor.
6 Whether was she in her home for breakfast,
7 dinner.

8 THE COURT: She said she was in her
9 home one time. Are you talking about work,
10 Counsel?

11 MR. CROSS: I am, Your Honor.

12 Q What did you personally observe in terms of
13 what measures Mrs. Wiley took to take care
14 of herself?

15 A Well, she was careful not to gain weight.
16 If she gained a few pounds, she would try to
17 get it taken off. She was very neat and
18 clean and had very good hygiene.

19 Q Do you know, based on your familiarity with
20 this woman in the nearly two decades you
21 spent working with her, do you have an
22 opinion as to whether or not she would have
23 knowingly exposed herself to a potentially
24 fatal health hazard?

25 MR. WAGNER: Well, Your Honor, this
SLAUGHTER-DIRECT

2404

1 is --

2 THE COURT: Objection sustained.

3 MR. WAGNER: These prejudicial
4 questions that Mr. Cross is asking, the way
5 he phrases it, Your Honor, it's just totally
6 basically unfair to the defendants to allow
7 this to continue to go on. This is probably
8 the 10th or 12th time Mr. Cross has done
9 this.

10 MR. CROSS: I have no more of these
11 questions, Your Honor.

12 Q You've been retired since 1992?

13 A That's right.

14 Q Have you observed any effects on your health
15 as a result of the time you spent at the
16 Veteran's Hospital?

17 MR. WAGNER: Your Honor, objection.
18 Not relevant.

19 MR. CROSS: I'll stand by the
20 question, Your Honor.

21 MR. WAGNER: Your Honor, may we
22 approach if we're going to argue about this?

23 THE COURT: I'll sustain the
24 objection at this point.

25 Go ahead, Mr. Cross.

SLAUGHTER-DIRECT

2405

1 MR. CROSS: Can I have a moment to
2 confer?

3 I pass the witness, Your Honor.

4 THE COURT: All right.

5 Cross-examination, Mr. Wagner?

6 MR. WAGNER: Yes, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. WAGNER:

9 Q Good morning, Mrs. Slaughter.

10 A Good morning.

11 Q We've never met; right?

12 A Right.

13 Q My name is Richard Wagner. I'm one of the

14 attorneys for a couple of the defendants in
15 this case. I want to ask you some
16 questions. I'm going to go kind of slowly
17 back through some things and some of the
18 things I may want to ask you about may have
19 been covered in those depositions that you
20 gave, that you told the jury about. Okay.

21 And if I don't ask you a question that
22 you understand, why you just tell me and
23 I'll try to rephrase it. Okay?

24

25 Q All right. You were pretty well acquainted
SLAUGHTER-CROSS

2406

1 with Mrs. Wiley, as you testified. You
2 knew, did you not, that Mrs. Wiley worked at
3 the Davis Clinic before she came to the
4 Veteran's Administration Hospital?

5 A I knew she worked there.

6 Q Did you know she worked there for four years
7 before she came to the Veteran's
8 Administration Hospital?

9 A I wasn't aware how long she worked there.

10 0 But you do remember that?

11 A Yes

11 A Yes.
12 Q Now, just to kind of put things in
13 perspective a little bit, Mrs. Slaughter,
14 you belong to a church that doesn't believe
15 in smoking; correct?

16 A That's right.

17 Q And that church is the Wesleyan Church?

18 A That's right.

19 Q That's the same church that Mrs. Wiley and
20 Phil Wiley belong to; correct?

21 A That's right. But I don't see what
22 relevance that has to do with this.

SLAUGHTER CROSS

SLAUGHTER-CROSS

240 /

MR. WAGNER: Thank you, Judge.

2 Q Would it be fair to say, Mrs. Slaughter,
3 that you said during direct examination that
4 cigarette smoke makes you cough. You don't
5 like cigarette smoke. Would that be a
6 correct statement?

7 A No, I don't like it.

8 Q Would you characterize yourself kind of
9 being extra-sensitive to cigarette smoke?
10 You don't like to be around it anyplace;
11 right?

12 A I'm not use

13 Q Now, I'm not sure I was 100 percent clear on
14 everything that you did when you began
15 working at the Veteran's Administration
16 Hospital after 1973, but during the years
17 that you worked in Building 16, you spent
18 most of your time working on the night shift
19 and also on the evening shift. Would that
20 be correct?

21 A All but four years.

22 Q And on the night shift would it be fair to

23 say, Mrs. Slaughter, that there were fewer
24 employees than there were during the daytime
25 working?

SLAUGHTER-CROSS

2408

1 A Let's see. Yes, there were fewer employees.
2 Q Thank you. And there would have been fewer
3 visitors during those shifts? Evenings and
4 nights?
5 A Evening shift we probably had more visitors
6 than the days did.
7 Q But then the midnight to 7:30 a.m. shift
8 there would have been, I suppose, very few
9 visitors.
10 A There's not usually visitors at that time.
11 Q And Mrs. Wiley worked evenings and nights as
12 well as days; right?
13 A When she was scheduled when they needed
14 somebody from the day shift to cover.
15 Q But it's a fact, isn't it, that you don't
16 recall ever working with Mrs. Wiley on the
17 night shift; right?
18 A No, I don't believe I ever did.
19 Q And it's fair to say, isn't it,
20 Mrs. Slaughter, that when Mrs. Wiley became
21 the head nurse, she spent about half of her
22 workday in her office?
23 A I don't believe she spent half of her
24 workday sitting in her office. She was
25 probably in and out of her office and that

SLAUGHTER-CROSS

2409

1 may have amounted to a half day.
2 Q Do you recall telling us in your deposition
3 that Mrs. Wiley spent about half of her day
4 in her office after she became the head
5 nurse. Is that a fair statement?
6 A That was an approximation, and I didn't say
7 that it was continuous four hours that she
8 spent in there.
9 Q Okay. But out of the workday after she
10 became head nurse, out of that full workday,
11 she spent about half of that day in her
12 office. Whether she was in there
13 continuously or not, but in and out about
14 half of her day; right?
15 A Possibly, to the best of my knowledge.
16 Q And when Mrs. Wiley became the head nurse,
17 she got her own office; right?
18 A That's right.
19 Q And her office was on the first floor of
20 Building 16; right?
21 A That's right.
22 Q And from where her office was situated, it
23 faced the hall; right?
24 A Yes, the door faced the hall.
25 Q And from where her office was situated, she

SLAUGHTER-CROSS

2410

1 could not see the nurse's station; right?
2 A The nurse's station was on the same side of
3 the hall.
4 Q So she could not see the nurse's station

5 from where her office was; correct?
6 A No.
7 Q All right. And Mrs. Wiley did not have any
8 ashtrays in her office, did she? That's a
9 correct statement, isn't it?
10 A I don't recall seeing any there.
11 Q And she had a fan on the wall?
12 A Yes, there was a fan.
13 Q In her office?
14 A That's right.
15 Q And she had a window in her office; correct?
16 A There was a window there.
17 Q And generally speaking, everybody that
18 worked in the Veteran's Hospital knew that
19 Mrs. Wiley did not like smoking; right?
20 A No, she didn't like smoking.
21 I want to add something else to the
22 question before. There was a window in her
23 office but she could only raise it six
24 inches.
25 Q Okay. And you never saw anyone smoking in
SLAUGHTER-CROSS

2411

1 Mrs. Wiley's office; correct?
2 A I wasn't in there when other people were in
3 there as a rule, and I don't recall that I
4 saw anybody.
5 Q Well, it's a fact that, based upon your
6 observations of Mrs. Wiley and what you can
7 remember, you never saw anyone smoking in
8 Mrs. Wiley's office; isn't that correct?
9 A I don't recall anybody smoking in there.
10 Q Thank you.
11 A But when I was in there, there wasn't
12 anybody else in there usually.
13 Q In fact, you've been in Mrs. Wiley's office
14 also when the window was open; right?
15 MR. CROSS: Your Honor, could we
16 have a time reference, please, to these
17 questions?
18 Q During the time that she was head nurse when
19 she had her office, you were in Mrs. Wiley's
20 office when she had the window open; right?
21 A If you would call six inches a window open,
22 yes.
23 Q Was there some remodeling that was done in
24 Building 16 from time to time?
25 A Yes.

SLAUGHTER-CROSS

2412

1 Q And what did that consist of?
2 A Rearranging the walls.
3 Q Ceilings too?
4 A Yes. The ceilings had been lowered, I think
5 three times on 16A.
6 Q Let's talk for a minute about the patients
7 in Building 16. Isn't it a fact that during
8 the last several years that you worked in
9 Building 16 there were only 21 patients on
10 the first floor?
11 A After they remodeled it the last time, which
12 I don't recall what year it was, it was 21
13 patients.

14 Q Now you recall, don't you, Mrs. Slaughter,
15 reading in the early 1970s reports that were
16 being published about somebody's assertion
17 or possible assertions that there -- that
18 exposure to secondhand smoke might cause
19 lung cancer?

20 A I don't recall that in the '70s. I
21 understand I said that in my deposition, but
22 I was mistaken. There was no secondhand
23 smoke information at that time, and I was
24 confused with primary smoke.

25 Q Well, you do recall testifying about that in
SLAUGHTER-CROSS

2413

1 your deposition; correct?

2 A I recall that's in my deposition, but it's
3 wrong.

4 Q And --

5 A At that time that -- I did not get it
6 straight.

7 Q And do you remember, Mrs. Slaughter, giving
8 this answer to this question in that
9 deposition at page 123:

10 "So it's your understanding, if I'm
11 correctly understanding, that in the 1970s
12 there was a general understanding among the
13 nursing staff about publications and reports
14 that exposure to environmental smoke could
15 be a health hazard?

16 "Answer: Oh, yes, even my retarded son
17 knows that. He listens to the news, he
18 comes in and tells me when he hears it."

19 Do you remember giving that answer to
20 that question?

21 A I told you I gave that answer, but I was
22 confused in the time period. There was no
23 such thing as articles on secondhand smoke
24 at that time. It was primary smoke in the
25 '70s. My son -- I was confused. My son was

SLAUGHTER-CROSS

2414

1 too young at that time to even do such.
2 This was in the late '80s.

3 Q Yes, ma'am. But all I'm asking is that you
4 gave that answer to that question in your
5 deposition; correct?

6 A Yes, I did in my deposition.

7 Q All right. And it's also a fact, isn't it,
8 that in the 1970s that you believed that
9 there was a general understanding among the
10 nursing staff about publications and reports
11 that alleged that exposure to environmental
12 tobacco smoke could be a health hazard;
13 isn't that right?

14 A I just told you that I was confused on that.
15 There was no such thing. Nursing service
16 knew that smoking, primary smoking was not
17 good for your health. In fact, the Surgeon
18 General came out with that information in
19 '64. And there was no such thing on
20 environmental smoke. Do you think we would
21 have allowed patients to have it if we
22 realized that?

23 Q All I'm asking you, Mrs. Slaughter, is
24 whether or not you answered this question
25 with this answer in your deposition at page
SLAUGHTER-CROSS

2415

1 122:

2 "Do you recall in the early 1970s
3 reports beginning to be published about the
4 possible association between exposure to
5 secondhand smoke and lung cancer?

6 "Answer, yes."

7 A I believe I explained that.

8 Q Excuse me, ma'am. And the next question
9 was, "And was that something that was widely
10 reported at the time?

11 "Answer: Well, you heard it on the
12 news and everything else. How could you
13 help but not know it.

14 "Question: Did you ever have any
15 discussions among the nursing staff when
16 these reports began coming out?

17 "Answer: Only when policies changed.

18 "Question: When was that?

19 "Well, there were different times when
20 reports would come out that the hospital
21 would set up policies as to employee
22 smoking.

23 "Question: Can you give me a
24 rough-year period?

25 "Goodness, I believe it was probably in
SLAUGHTER-CROSS

2416

1 the '70s when they came out and said that
2 people weren't supposed to smoke in meetings
3 but they still did."

4 Do you remember giving those answers to
5 those questions in your deposition?

6 A I remember giving those answers.

7 Q And they were true at the time you gave
8 them?

9 A No, they weren't, and I misunderstood. It
10 was in the late '80s that there were
11 publicity that the possibility of secondhand
12 smoke was dangerous. Which never did come
13 out and say that it caused lung cancer.

14 Q You remember, Mrs. Slaughter, that after you
15 gave your deposition under oath in this case
16 that you also were given an opportunity to
17 read your deposition.

18 A Yes, I read it, but it did not -- it did
19 not -- at the time I read it, I didn't
20 realize. I guess I wasn't realizing the
21 time reference that was stated.

22 Q And after you read your deposition, you
23 understood you had an opportunity to make
24 changes that were wrong? That is to say, to
25 make changes as to testimony that you gave

SLAUGHTER-CROSS

2417

1 that was transcribed into your deposition
2 that was wrong. You understood you had an
3 opportunity to do that, did you not?

4 MR. CROSS: Your Honor, Mr. Wagner

5 is just arguing with the witness.
6 THE COURT: The last is a fair
7 question. Did they tell you you had an
8 opportunity to change an answer?
9 A Yes, they did, but I didn't realize that --
10 the time reference. I mean, he keeps
11 talking to me about the time reference when
12 I've told him that I did not understand at
13 the time that I was saying the 1970s.
14 Q Well, let's move on.
15 It's also correct, isn't it,
16 Mrs. Slaughter, that during the entire time
17 that you worked in Building 16, patients
18 were not allowed to smoke in their rooms?
19 A Yes, that was a fire hazard.
20 Q Nurses, I take it, would spend time in the
21 patients' rooms caring for them; right?
22 A Yes.
23 Q And did the patients on the first floor go
24 to bed about 8:00 or 9:00 p.m.?
25 A Yes.

SLAUGHTER-CROSS

2418

1 Q And smoking in the Veteran's Administration
2 Hospital was prohibited after the patients
3 went to bed?
4 A Yes, it was prohibited in the bedrooms.
5 Q It was always prohibited in the bedrooms,
6 wasn't it?
7 A Yes.
8 Q Now, you never complained about having to
9 help patients smoke; isn't that correct?
10 A No.
11 Q It's not correct?
12 A No. I never complained.
13 Q You never made any formal complaints about
14 the smoke; isn't that also correct?
15 A That's right. Just complained to people
16 around me.
17 Q You talked about, in answer to Mr. Cross'
18 questions, you talked about fans and where
19 they were and also there was also a smoke
20 eater in the day room. Isn't that correct?
21 A There was a smoke eater in the day room on
22 the second floor. There was not an exhaust
23 fan there.
24 Q But there was a smoke eater on the second
25 floor in the day room?

SLAUGHTER-CROSS

2419

1 A That's right.
2 Q And you also recall, do you not,
3 Mrs. Slaughter, that the Veteran's
4 Administration instituted no smoking
5 policies and designated certain areas where
6 smoking could be done?
7 A When are you referring to this?
8 Q I'm just asking if you recall that
9 occurring. You do recall, do you not, that
10 the Veteran's Administration issued no
11 smoking policies and designated certain
12 areas where smoking could be done?
13 A Yes. This was in the late '80s. Probably

14 about '89.
15 Q Now, these windows in Building 16 that you
16 referred to, I think you said they could be
17 raised about six inches; right?
18 A That's right.
19 Q And they could be opened anytime; right?
20 A That's right.
21 Q And in the warm weather, the windows were
22 always open, weren't they?
23 A Yes. It was hot.
24 Q And in colder weather they would be opened
25 to get the air circulating and stay open

SLAUGHTER-CROSS

2420

1 until it got too cold and then someone would
2 close them; right?
3 A Yes, it depended on the weather.
4 Q And you recall when the Veteran's
5 Administration installed window air
6 conditioners in Building 16; correct?
7 A Yes, they installed one at a time as they
8 had funds appropriated.
9 Q And talking about the day room in Building
10 16 on the first floor and fans, there was
11 always an exhaust fan in the first floor day
12 room; correct?
13 A I believe they took that exhaust fan out
14 when they put the air conditioning in. I'm
15 not positive.
16 Q Do you remember that you told us that that
17 was the case in your deposition?
18 A There had been an exhaust fan in there. I
19 can't recall if it was in there the last
20 time -- the last time they did or not. I
21 don't recall for sure. It seems like it was
22 in the other window. The air conditioner
23 was in one window.
24 Q Let me see if I can refresh your
25 recollection. At page 81 of your deposition

SLAUGHTER-CROSS

2421

1 do you recall this question and your answer:
2 "Did anyone ever suggest putting fans
3 in the day room to help ventilation in the
4 day room?
5 "Answer: There was one exhaust fan put
6 in on the first floor."
7 A Now that I think about it, the second floor
8 was the one that didn't have an exhaust fan.
9 The first floor did. It was about, I
10 suppose, an 18-inch exhaust fan.
11 Q Now, that list of cigarette brands that
12 Mr. Cross asked you about; do you remember
13 the questions that he asked you about those?
14 A Uh-hum.
15 Q And let me ask you a few questions about it.
16 You worked at the Veteran's Administration,
17 just to go back for a moment, from 1960 to
18 1965 and 1973 to 1992. Is that correct?
19 A That's right.
20 Q And all those years were a few years ago at
21 this point; right?
22 A That's right.

23 Q And when you -- before you made that list,
24 Mr. Howard met and talked with you about
25 that list?

SLAUGHTER-CROSS

2422

1 A No. He called me on the telephone and asked
2 me if I could recall. And I told him the
3 names of some of the cigarettes.

4 Q In fact, in about October of 1970 -- 1997,
5 Mr. Howard called you and asked you if you
6 would sign an affidavit listing brands of
7 cigarettes smoked at the Veteran's
8 Administration; correct?

9 A That's right.

10 Q And then he prepared an affidavit and
11 brought it out to your house?

12 A That's right.

13 Q This was on October 18, 1997?

14 A Yes.

15 Q Did he tell you at that time that it was
16 something that would be used in this
17 lawsuit?

18 A That's right.

19 Q Now, October of 1997 was five years after
20 you retired from the Veteran's
21 Administration Hospital; correct?

22 A Yes.

23 Q And you may not know this, but this lawsuit
24 was filed in 1993, so it was four years
25 after this lawsuit was filed; right?

SLAUGHTER-CROSS

2423

1 A Yes.

2 Q And Mrs. Slaughter, you've given different
3 versions of that list of cigarette brands
4 that you identified; right?

5 A No, I don't believe it's different versions.

6 Q Do you remember --

7 A I added to my list when I went to the second
8 deposition.

9 Q Right. Well, you were deposed in this case
10 in your first deposition, and you talked
11 about brands being sold at the Veteran's
12 Administration; do you remember that? Do
13 you remember identifying three brands?

14 A I believe the term used was sold. They were
15 also smoked.

16 Q You said Camels, Lucky Strikes and
17 Chesterfield were sold at the Veteran's
18 Administration; right?

19 A Those were three of them, uh-hum.

20 Q Then when Mr. Howard came out to see you and
21 you gave him an affidavit as to the brands,
22 you mentioned Camels and Lucky Strike, Kent,
23 Old Gold, Marlboro and Kool in that
24 affidavit; right?

25 A To the best of my knowledge, that is.

SLAUGHTER-CROSS

2424

1 Q And the list that you've given the jury here
2 today is an even more expansive list; right?

3 A That's right.

4 Q What brand was that generic brand that you

5 mentioned to the jury?
6 A All it said was generic. I don't know who
7 made them.
8 Q As to that list of brands that you told the
9 jury about, it's a fact, isn't it,
10 Mrs. Slaughter, that you don't know what
11 specific years those brands were sold or
12 smoked at the Veteran's Administration?
13 A Between 1973 and 1992, I know.
14 Q But you don't know what specific years
15 within that long time period that any of
16 those brands were sold at the hospital;
17 correct?
18 A I don't have a running list of what
19 cigarettes were sold what years, but I know
20 during the time I worked there, these
21 cigarettes were sold and smoked.
22 Q Patients smoked cigars and pipes there too?
23 A Not very many. Occasionally you might have
24 one that did.
25 Q Visitors brought the patients cigarettes,

SLAUGHTER-CROSS

2425

1 cigars, pipes from time to time?
2 A On occasion they might.
3 MR. WAGNER: Let me check my notes
4 here for a minute, Your Honor.
5 THE COURT: All right.
6 MR. WAGNER: I think that's all I
7 have. Thank you.
8 THE COURT: Mr. Ohlemeyer, any
9 questions?
10 MR. OHLEMAYER: Yes, Your Honor.
11 Do you want to ask them now or take a break?
12 THE COURT: Go ahead.
13 MR. OHLEMAYER: Thank you, Your
14 Honor.

15 CROSS-EXAMINATION

16 BY MR. OHLEMAYER:

17 Q Good morning, Mrs. Slaughter. My name is
18 Bill Ohlemeyer, and I represent three of the
19 companies Mr. Wiley has sued. And we've not
20 met before today, have we?
21 A No.
22 Q I want to ask you a couple of questions.
23 First of all, may I see the list that you
24 brought with you?
25 A Sure.

SLAUGHTER-CROSS

2426

1 Q Am I correct, Mrs. Slaughter, that you were
2 deposed in this case in December of 1994?
3 Do you remember that?
4 A Yes.
5 Q And do you remember that there was a court
6 reporter there, just like there is today,
7 that took down the questions and the
8 answers?
9 A Yes.
10 Q And you remember Mr. Howard was there
11 representing Mr. Wiley?
12 A Yes.
13 Q Mr. Cross and Mr. Motley weren't there;

14 isn't that right?
15 A No. They weren't there.
16 Q And a man by the name of Mr. Koethe asked
17 you the questions first. Do you remember
18 that?
19 A I remember he asked me some questions.
20 Q And you remember at page 8, Counsel, line 5,
21 that he told you if you didn't understand
22 any of his questions, to let him know and he
23 would clarify or rephrase the questions.
24 A Yes.
25 Q And you remember that he told you if you

SLAUGHTER-CROSS

2427

1 wanted to take a break at any point in time
2 that you should let him or Mr. Howard know
3 and he would be happy to take a break?
4 A Yes.
5 Q And he asked you, even, if you were on any
6 medication or anything that might interfere
7 with your ability to understand the
8 questions?

9 MR. CROSS: Your Honor, I will
10 object to these questions. They are not
11 relevant to any issue that's before this
12 court.

13 THE COURT: Where are you going,
14 Counselor?

15 MR. OHLEMAYER: To the errata
16 sheet, Your Honor.

17 THE COURT: All right. Go ahead.

18 Q Do you remember that?
19 A Yes.

20 Q And you remember at the end of the
21 deposition the court reporter asked
22 everybody at the table, including you,
23 whether you were going to read and sign the
24 deposition? Do you remember that?

25 A Yes.

SLAUGHTER-CROSS

2428

1 Q And Mr. Howard told you it was up to you
2 whether you wanted to see a copy of what you
3 said and you said you did.

4 A Yes.

5 Q And then do you remember the court reporter
6 actually sent you a sheet of paper on which
7 you could make corrections to the
8 deposition?

9 A Yes.

10 Q Let me hand you what I've marked, Your
11 Honor, for identification as Exhibit I-1.

12 MR. OHLEMAYER: May I approach?

13 THE COURT: Sure.

14 Q Is that the sheet, Mrs. Slaughter, that the
15 court reporter sent you?

16 A Yes.

17 Q And you made those corrections to those
18 pages?

19 A Yes.

20 Q And it's cut off at the bottom but that's
21 the top of your signature there on the
22 bottom right hand of that, isn't it?

23 A It looks like it.
24 Q All right. And am I correct that on page
25 50, line 15, you said they wrote the word
SLAUGHTER-CROSS

2429

1 "retired" when it should have been
2 "returned"; right?
3 A That's what I wrote on the paper. I don't
4 recall that line.
5 Q And there was another point where you said
6 they wrote the word "she" and it should have
7 been "we"?
8 A If I wrote it down, that's what it was.
9 Q Another one where it says "course" and it
10 should have been "nurse"?
11 A Apparently that's right.
12 Q One said "on" and you said it should have
13 been "off duty." Right?
14 A To the best of my knowledge, it must be. I
15 wrote it there.
16 Q And then at one point in the deposition the
17 word "occasion" occurred and you said it
18 should have been "occasions" with an S.
19 A Yes.
20 Q Those are the only changes you wished to
21 make following your deposition.
22 A I didn't notice anything else or I would
23 have written it.
24 Q And am I correct at that deposition,
25 Mrs. Slaughter, you listed three brands of
SLAUGHTER-CROSS

2430

1 cigarettes that you could remember being
2 sold at the VA?
3 A I also stated that there were other brands
4 that I didn't remember.
5 Q But you could only remember three in
6 December of 1994; isn't that right?
7 A That was on the spur of the moment, that's
8 what I could remember.
9 Q And then there came a point in time in 1997
10 where Mr. Howard had you fill out an
11 affidavit that contained some additional
12 brands; isn't that right?
13 A That's right.
14 Q And there were six on that list?
15 A That's right.
16 Q And then today, February of 1998, you've
17 brought this list.
18 A That was also on that second deposition.
19 Q And the second deposition was taken when,
20 Mrs. Slaughter?
21 A August of '97.
22 Q So in August of '97 then there were 1, 2, 3,
23 4, 5, 6, 7, 8, 9, 10, 11, 12 that you could
24 remember?
25 A That's right.

SLAUGHTER-CROSS

2431

1 Q Did you ever work with a nurse by the name
2 of Marilyn Bardsley?
3 A Yes, I did.
4 Q Did you all work together at the VA?

5 A We worked on the same building. There were
6 times when we worked on the same ward.
7 Q What was her assignment?
8 A She was a staff nurse.
9 Q Where?
10 A Building 16.
11 Q What floor?
12 A Usually she worked on third floor.
13 Q Did you see her every day at work?
14 A Well, I saw her when she was there and I was
15 there at the same time. Our schedules were
16 according to nurses. They had to cover the
17 assignments.
18 Q You had different assignments and different
19 schedules; isn't that right?
20 A Oh, yes.
21 Q When is the last time you saw her?
22 A When is the last time I saw her?
23 Q Yes.
24 A I saw her yesterday.
25 Q And how?

SLAUGHTER-CROSS

2432

1 A I met her in the hotel.
2 Q Did you have dinner together?
3 A Yes.
4 Q Am I correct, Mrs. Slaughter, that Mrs.
5 Wiley didn't like cigarette smoke?
6 A That's right.
7 Q And she didn't allow cigarette smoking --
8 let me rephrase that.
9 You never saw anyone smoke cigarettes
10 in her office?
11 A I don't recall seeing anybody smoke in her
12 office.
13 Q And you doubt that anyone would have smoked
14 in her office?
15 A I never said that and I don't know.
16 Q Well, do you remember page 60, Counsel, line
17 2, the December 19, 1994 deposition,
18 Mrs. Slaughter, these questions and your
19 answers:
20 "Question: Did you ever observe people
21 smoking in her office?
22 "Answer: I never did.
23 "Question: Did she indicate to you
24 that she didn't like or didn't want people
25 smoking in her office?

SLAUGHTER-CROSS

2433

1 "Answer: I don't think she ever did
2 verbally but I know she wouldn't like that.
3 "Question: That was your understanding
4 based on knowing her?
5 "Answer: I doubt that anybody smoked
6 in her room."
7 Do you recall those questions and those
8 answers, Mrs. Slaughter?
9 A I do recall it.
10 Q Now --
11 A I said I doubt it. I did not say that they
12 did not or that they did.
13 Q Do you know whether there were health

14 warnings or warnings on the packages of
15 cigarettes that were used at the VA?
16 A Yes, as I recall, there was warnings on them
17 after the Surgeon General.
18 Q And you understand who the Surgeon General
19 is?
20 A Yes. He's the Surgeon General of the United
21 States.
22 Q And do you know who operates the Veteran's
23 Administration Hospital?
24 A The Veteran's Affairs.
25 Q Is that a government agency?

SLAUGHTER-CROSS

2434

1 A Yes.
2 Q Do you know whether or if the Surgeon
3 General of the United States issued any kind
4 of report in 1986 about the health effects
5 of exposure to environmental tobacco smoke?
6 A I don't recall.
7 Q Is it your testimony that no one at the
8 Veteran's Administration Hospital ever said
9 anything to you about any Surgeon General's
10 Report?

11 MR. MOTLEY: Excuse me, Your Honor,
12 I'll raise once more what I raised at your
13 bench yesterday, and it's just one more
14 incidence of what I raised yesterday, and I
15 ask again for a 105 instruction. If they
16 can persist in this line of questions, I
17 think that the case is building that that
18 needs to be given.

19 MR. OHLEMAYER: Your Honor, this
20 was a question on direct examination of this
21 witness.

22 THE COURT: The request for special
23 instruction is denied.

24 Go ahead, Mr. Ohlemeyer.

25 Q Mrs. Slaughter, do you remember the names
SLAUGHTER-CROSS

2435

1 of -- any of the names of the candy bars
2 that were distributed at the VA Hospital?
3 A I don't recall the names of the candy bars.
4 Q Just a couple of questions, Mrs. Slaughter.
5 Am I correct that there are laws that
6 require certain procedures to be performed
7 only by doctors and registered nurses?
8 A I never saw any laws. There are certain
9 things that I understand nurses and doctors
10 do.
11 Q And do you know whether -- let me rephrase
12 the question.
13 There came a time in the 1980s in this
14 part of Indiana where nurses were being
15 recruited by other hospitals; isn't that
16 right?
17 A Nurses were being recruited by who?
18 Q Other hospitals.
19 A I don't recall. I know VA recruited nurses.
20 Q Did there come a time, do you recall, in the
21 '80s where the Medicare people tried to
22 encourage the use of home care by nurses?

23 Nurses in the home rather than putting
24 people into the hospitals?

25 A When did you say that was?
SLAUGHTER-CROSS

2436

1 Q During the 1980s.

2 A Yes. That was my understanding.

3 Q And that created a demand for nurses in this
4 part of Indiana, didn't it?

5 A I wasn't aware of it.

6 Q You didn't -- a recruiter or nobody ever
7 called you and ever tried to get you to
8 move?

9 A No.

10 MR. OHLEMAYER: That's all I have,
11 Your Honor. Thank you. I'll give the
12 witness the list back.

13 THE COURT: Any redirect,
14 Mr. Cross?

15 MR. CROSS: Yes, Your Honor, thank
16 you.

17 REDIRECT EXAMINATION

18 BY MR. CROSS:

19 Q Mrs. Slaughter, you were -- did you have any
20 specialization as a respiratory nurse?

21 A No, I didn't.

22 Q Did Millie Wiley?

23 A Not to my knowledge.

24 Q And there are such -- there are nurses who
25 specialize in respiratory care; is that not

SLAUGHTER-REDIRECT

2437

1 correct?

2 A There probably are now, because nurses have
3 gone into all areas on specialization. And
4 on units in hospitals that deal with
5 respiratory problems, I'm sure there are
6 nurses who are registered who are qualified
7 and have had special education for this
8 specialization.

9 Q Do you recall if there were any such
10 specialized nurses during the time that you
11 worked at the VA Hospital?

12 A No, I don't.

13 Q Mr. Wagner asked you a long series of
14 questions about times when Mrs. Wiley was
15 the head nurse and her office and its
16 ventilation and things like that. Just to
17 make sure we're clear on this time
18 reference, this was after she became head
19 nurse; correct?

20 A Come back with that question again.

21 Q Do you remember Mr. Wagner asking you
22 questions about Mrs. Wiley's office?

23 A Yes.

24 Q And how long she spent in there?

25 A Yes.

SLAUGHTER-REDIRECT

2438

1 Q And how the six-inch window and the fan and
2 whatever. Do you remember those questions?

3 A Yes.

4 Q Now, your answers to those questions pertain

5 to the time only when she was head nurse?
6 MR. OHLEMAYER: Objection, Your
7 Honor, leading.

8 A Yes.
9 THE COURT: The last was leading
10 and the jury will disregard the response.
11 Rephrase that, Counselor.

12 MR. CROSS: I will, Your Honor.
13 Q During what period of time was it that you
14 were referring to when you were responding
15 to Mr. Wagner's questions about Mrs. Wiley's
16 office?

17 A During the time she was head nurse.

18 Q And when was the time that she was the head
19 nurse?

20 A I believe she became head nurse in 1985 or
21 '86.

22 Q And did she have an office at any time prior
23 to 1985 or 1986?

24 A No.

25 Q Okay. Now, do you know anything about an
SLAUGHTER-REDIRECT

2439

1 open door policy that Mrs. Wiley had with
2 regard to her office?

3 MR. OHLEMAYER: Objection, Your
4 Honor, leading.

5 MR. WAGNER: Also outside the scope
6 of redirect, Your Honor.

7 THE COURT: You can answer that.

8 A Her door was always open.

9 Q Do you know why that was?

10 A Because she didn't want to exclude herself
11 from anybody. She wanted her office an open
12 door so we could come in any time to talk to
13 her.

14 Q Thank you. Did you ever see Mrs. Wiley
15 actually light a cigarette for a patient?

16 MR. WAGNER: Outside the scope of
17 redirect, Your Honor.

18 MR. CROSS: This is redirect,
19 Mr. Wagner. It can't be outside the scope
20 of it.

21 THE COURT: Overruled. You can
22 answer that question. Did you understand
23 the question?

24 A Yes, I have.

25 Q Why was smoking prohibited in the bedrooms?

SLAUGHTER-REDIRECT

2440

1 A For safety reasons.

2 Q What do you mean?

3 A Patient may drop a cigarette, set the place
4 on fire.

5 Q Was there smoke in the bedrooms,
6 nonetheless, even though smoking was not
7 permitted in there?

8 A Oh, it saturated all the air, wherever it
9 was in the building.

10 Q Anywhere in the building?

11 A Yes.

12 Q Including Mrs. Wiley's office?

13 A Yes.

14 Q Mr. Wagner read you an extended bit of
15 testimony from your first deposition in 1994
16 in which you talked about your retarded son
17 came in and told you things about that he
18 had seen on television. How old is your
19 son?

20 A My son is now 34 1/2.

21 Q And can you tell this jury the nature of his
22 impairment?

23 MR. WAGNER: Well, Judge, this is
24 irrelevant, Your Honor.

25 MR. CROSS: It is not irrelevant.

SLAUGHTER-REDIRECT

2441

1 I'm entitled to explain her testimony.
2 THE COURT: Generally. Go ahead
3 and answer that.

4 A He was brain damaged at birth and he had
5 epilepsy.

6 Q When was he born?

7 A He was born in 1963.

8 Q So in the years of the 1970s he would have
9 been anywhere from 7 to 16 years of age?

10 A That's right.

11 Q How old was he when he would come in and
12 tell you about these reports he was seeing
13 on television?

14 MR. WAGNER: Well, Judge, you know,
15 this is improper. The answer that was read
16 to her was her answer about what she knew,
17 and she emphasized her answer in her
18 deposition by referring to the fact that
19 even her son would know that, and it's not
20 proper to go into all that. That was just
21 part of the deposition answer, Your Honor.

22 THE COURT: Overruled. You can
23 answer the last question.

24 A My son finished school when he was -- it was
25 in 1982, and after that he decided to have a

SLAUGHTER-REDIRECT

2442

1 bike riding program for exercise, because we
2 talked about exercise. I had two other sons
3 who were high school students. And so he
4 decided for his exercise he would ride a
5 bike. And he would have a radio. And so in
6 the late '80s he would come in because he
7 knew that smoking had been in the news
8 during that time, and he didn't like smoke,
9 and he would come in and tell me anything he
10 heard about it on the radio.

11 Q And I want to draw your attention to a
12 specific provision in the deposition. This
13 was in the testimony that Mr. Wagner read to
14 you.

15 Page 122, line 20, Counsel.

16 MR. WAGNER: Excuse me, Your Honor,
17 it's improper for Counsel to inquire of the
18 witness about things that she said in her
19 deposition. We're certainly allowed to
20 question the witness on cross-examination
21 about things she said in her deposition but
22 it's improper for Mr. Cross to read parts of

23 her deposition.

24 MR. CROSS: I was reading the same
25 thing he read to her. I would like to ask

SLAUGHTER-REDIRECT

2443

1 her the question --

2 THE COURT: Is it the same question
3 he asked?

4 MR. CROSS: The same question he
5 asked.

6 THE COURT: Go ahead.

7 MR. CROSS: Again, this is on page
8 122, line 20, for the record.

9 MR. WAGNER: Which deposition?

10 MR. CROSS: First deposition.

11 Q "Question: Did you ever have any
12 discussions among the nursing staff --"

13 This is in the context of the early
14 1970s reports that he was talking about.

15 "Question: Did you ever have any
16 discussion among the nursing staff when
17 these reports began coming out?"

18 Your answer was: "Only when policies
19 changed." And Mr. Wagner asked you if that
20 was your testimony.

21 MR. WAGNER: Excuse me.

22 Q May I finish the question? And that was
23 your answer. The question I have is what
24 policies were you referring to in your
25 answer?

SLAUGHTER-REDIRECT

2444

1 A Those were the policies -- like I said, I
2 was mixed up on the date. Those were the
3 policies in the late 1980s when they started
4 changing the rules for where personnel could
5 smoke.

6 Q In the 1970s, was there any restriction on
7 smoking anywhere in the Veteran's Hospital
8 other than the bedrooms because of the fire
9 hazard?

10 A No, there wasn't.

11 Q Now, being as how -- where is that errata
12 sheet?

13 There has been submitted to you
14 Defendants' Exhibit I-1.

15 MR. CROSS: May I approach, Your
16 Honor?

17 THE COURT: Go ahead.

18 Q This, you understand, as Mr. Ohlemeyer
19 questioned you, these are a list of items
20 that you read and you found incorrect in
21 your deposition and you corrected them;
22 correct?

23 A That's right.

24 Q How many are there? How many things did you
25 note?

SLAUGHTER-REDIRECT

2445

1 A Five.

2 Q There were five different items. Now, let
3 me suggest to you this: Your first
4 deposition was attended by ten lawyers.

5 MR. OHLEMAYER: Your Honor, I
6 object to all of this.
7 THE COURT: Sustained to the last.
8 Q All right. The first deposition was 144
9 pages long.
10 A That's right.
11 MR. OHLEMAYER: Same objection.
12 MR. CROSS: This is relevant, Your
13 Honor.
14 THE COURT: Sustained. Let's move
15 on.
16 Q Mr. Ohlemeyer asked you some questions about
17 whether or not you understood the ground
18 rules of the deposition. Correct?
19 A Yes.
20 Q Whether you understood you could take a
21 break, and if you didn't understand the
22 question, you were supposed to give -- tell
23 them so. Do you remember giving that
24 answer?
25 A Yes. That's right.

SLAUGHTER-REDIRECT

2446

1 Q Do you recall how long the first deposition
2 took?
3 MR. OHLEMAYER: Same objection,
4 Your Honor.
5 MR. WAGNER: Same objection, Your
6 Honor.
7 MR. CROSS: He's asked her about
8 her -- you know, whether she was alert and
9 she understood the ground rules. I ought to
10 be able to get into the fact that this
11 was --
12 THE COURT: Objection sustained.
13 Let's move on.
14 Q In any case, Mrs. Slaughter, do you have an
15 impression as to whether these questions
16 were asked of you near the beginning of your
17 deposition, in the middle or near the end?
18 A It was near the end, close to 4:00 in the
19 afternoon.
20 Q Thank you. Now, when you -- that was your
21 first deposition. You gave another
22 deposition, looks like last year sometime.
23 Do you recall how long that deposition took?
24 MR. OHLEMAYER: Same objection.
25 MR. CROSS: I'll withdraw the

SLAUGHTER-REDIRECT

2447

1 question.
2 Q In both of your depositions, Mrs. Slaughter,
3 do you recall the court reporter giving you
4 an oath to tell the truth, the whole truth,
5 so help you God?
6 A Yes, I do.
7 Q And what does that mean to you?
8 A That means as close as I can recall and as
9 truthful as I know.
10 Q Mr. Wagner asked you do you have any
11 religious convictions about cigarette
12 smoking. Do you remember that question?
13 A Yes.

14 Q What are the nature of the convictions that
15 you have in your religion concerning that
16 subject?
17 A I was always taught that it was wrong to
18 smoke because it was harmful to the body,
19 and I have always felt that it was not good
20 to put things into your body that would be
21 harmful.
22 Q And does your religion have convictions
23 about what your conduct should be when you
24 assume an oath to tell the whole truth and
25 nothing but the truth so help you God?

SLAUGHTER-REDIRECT

2448

1 MR. WAGNER: Your Honor, I think
2 the oath speaks for itself.

3 THE COURT: Sustained.

4 Q And as you sit here today, would you
5 represent to this jury that you, in fact,
6 told the truth to the best of your ability
7 every time you have taken such an oath?

8 A I certainly have.

9 Q These cigarette packs that -- when you were
10 discussing cigarettes from the canteen to
11 the patients who smoked, you would actually
12 take the cigarettes out of the packs and
13 hand them to the patients, would you not?

14 A Yes.

15 Q And did you then -- you then had to assist
16 the patients in smoking sometimes, did you
17 not?

18 A Yes, we did.

19 Q How would you do that?

20 MR. WAGNER: Your Honor, it's all
21 repetitious and outside the scope of our
22 cross-examination and proper redirect
23 examination.

24 THE COURT: I agree. Sustained.

25 Q Well, did you have to feed the veterans the
SLAUGHTER-REDIRECT

2449

1 candy bars or were they able to unwrap those
2 wrappers themselves?

3 A Usually if a patient had a candy bar, they
4 would do it themselves because, if they
5 weren't able to open up candy, there may be
6 nuts and so on in it that they would choke.
7 Unless they just requested it, we didn't
8 order candy bars.

9 Q And what was the relative amount of
10 cigarettes that you would dispense from the
11 canteen as opposed to candy bars?

12 A It depended on the ward that you were on.
13 Some wards no patients would get candy bars.
14 Other wards there may be anywhere from two
15 to maybe five. Depends on the size of the
16 ward.

17 Q And how many people on those same wards
18 would be given cigarettes?

19 A Any of them that smoked, which was usually
20 all of them except maybe a few. One or two,
21 three, depends on how many veterans were on
22 that ward.

23 Q Do you know what nitrosamines are?
24 MR. WAGNER: Objection, Your Honor.
25 Outside the scope.

SLAUGHTER-REDIRECT

2450

1 MR. CROSS: He was inquiring --
2 THE COURT: It's outside the scope.
3 MR. CROSS: He was inquiring into
4 her knowledge of secondhand smoke. I didn't
5 mean to intrude.
6 Q You stated -- Mr. Wagner was asking you a
7 question about what your knowledge of
8 secondhand smoke was in the 1970s, and you
9 appeared to get upset with the idea that
10 you, as a nurse, would be exposing to
11 patients -- exposing patients in the
12 hospital to a health hazard that could cause
13 fatal lung disease.

14 MR. WAGNER: Your Honor, this is a
15 speech. It's leading.

16 THE COURT: Rephrase that,
17 Counselor.

18 MR. CROSS: Let me finish the
19 question.

20 THE COURT: Rephrase that.

21 MR. CROSS: Thank you.

22 Q In the 1970s when you worked in Building 16,
23 what knowledge did you have as to the health
24 risks associated with secondhand smoke, in
25 particular the possibility that it could

SLAUGHTER-REDIRECT

2451

1 generate fatal lung disease?
2 MR. OHLEMAYER: I object to the
3 question as argumentative, Your Honor.

4 THE COURT: I believe it is.
5 Sustained.

6 Q What knowledge did you have about secondhand
7 smoke and its health risks in 1970 -- in the
8 1970s?

9 A We had no information on this. We had --
10 all that I thought was that it was not good
11 for your health.

12 Q Did anyone have -- do you know of any person
13 who had any knowledge in the 1970s at the
14 Veteran's Administration Hospital that
15 secondhand smoke could cause fatal lung
16 disease?

17 MR. WAGNER: Objection, Your Honor,
18 no foundation as to what she might know and
19 what everyone else knew.

20 MR. CROSS: That's not the
21 question. I asked her if she knew any
22 person, any one person.

23 THE COURT: Let me hear the
24 question again.

25 Q Did you know any single individual at the

SLAUGHTER-REDIRECT

2452

1 Veteran's Administration Hospital in the
2 1970s that was aware that secondhand smoke
3 could cause fatal lung disease?

4 THE COURT: Objection sustained.

5 Q Mr. Ohlemeyer asked you if you -- he brought
6 up the fact that in your deposition he asked
7 you if you remembered saying in your
8 deposition that there were three brands.

9 MR. CROSS: Your Honor, I would
10 like to read a few lines -- I would like to
11 read the lines of testimony he was referring
12 to in order to ask her a question in order
13 to rehabilitate that particular testimony.

14 MR. WAGNER: Objection, Your Honor,
15 it's improper for counsel who takes the
16 witness on to read from a deposition.

17 THE COURT: Sustained.

18 Q Is there any question in your mind as you
19 sit here today that all of the brands that
20 you gave to this jury were, in fact, smoked
21 by patients or staff at the Veteran's
22 Hospital during the time you worked there?

23 A That's right.

24 Q And after all of Mr. Wagner and
25 Mr. Ohlemeyer's questions, do you have

SLAUGHTER-REDIRECT

2453

1 any -- does that affect the reliability of
2 your earlier testimony that you had no
3 knowledge of secondhand smoke until after
4 Millie Wiley died?

5 MR. WAGNER: Objection, Your Honor,
6 as to what her opinion is or her own
7 reliability.

8 THE COURT: Sustained.

9 Q Was there anything about any of their
10 questions that changed your mind from your
11 testimony when I was up here about --

12 A The only thing I want to say is that --

13 MR. WAGNER: Judge, we're going to
14 get a volunteer statement here.

15 THE COURT: I think your question
16 is, if I understand you, correct me here if
17 I'm wrong. Are you asking this lady if she
18 wants to change any of her testimony from
19 when you talked to her before?

20 Q As a result of anything these people asked.

21 THE COURT: You can answer that yes
22 or no.

23 A No.

24 MR. CROSS: Thank you. Nothing
25 further.

SLAUGHTER-REDIRECT

2454

1 THE COURT: Mr. Wagner, anything
2 further?

3 MR. WAGNER: I just have one brief
4 question.

5 RECROSS-EXAMINATION

6 BY MR. WAGNER:

7 Q You described to Mr. Cross the seriousness
8 that you attribute to giving testimony under
9 oath; correct?

10 A Correct.

11 Q And it's correct, isn't it, that when you
12 gave your depositions in this case you were
13 under oath to tell the truth?

14 A That's correct.
15 MR. WAGNER: Thank you very much.
16 THE COURT: Mr. Ohlemeyer?
17 MR. OHLEMAYER: Very briefly, Your
18 Honor.

19 RECROSS-EXAMINATION
20 BY MR. OHLEMAYER:

21 Q Am I correct, Mrs. Slaughter, that as a
22 nurse it was your practice to keep abreast
23 of current health developments, new studies,
24 declarations by public health officials
25 about matters of public health?

SLAUGHTER-RECROSS

2455

1 A I tried.
2 Q And that was something that was fairly
3 common among the nursing staff at the VA,
4 wasn't it?

5 A Yes.
6 Q And you recall in the early '70s reports
7 beginning to be published about the possible
8 association between exposure to secondhand
9 smoke and lung cancer; isn't that correct?

10 MR. CROSS: Your Honor, I'll
11 object. This is repetitive to Mr. Wagner's
12 line of questioning, Mr. Ohlemeyer's
13 questioning, and I didn't go into that on
14 redirect.

15 A I did not lie.
16 THE COURT: Just a minute, ma'am.

17 The objection is overruled. Repeat
18 your question.

19 Q My question, Mrs. Slaughter, is isn't it a
20 fact that you recall in the early '70s there
21 were reports that were beginning to be
22 published about the possible association
23 between exposure to secondhand smoke and
24 lung cancer?

25 A Not in the '70s. I told you I was confused

SLAUGHTER-RECROSS

2456

1 when that question was asked. I had the
2 wrong date in mind.

3 Q And I understand that, but let me just make
4 sure this question, that you agree with me,
5 this question and this answer were asked of
6 you at your deposition at page 122, line 9,
7 Counsel.

8 "Question: Let me see if I can refresh
9 your recollection on the matter. Do you
10 recall in the early 1970s --"

11 MR. CROSS: Well, Your Honor, this
12 is the same question. This was asked, it's
13 repetitive, it's argumentative. Asked and
14 answered.

15 THE COURT: You asked this question
16 on cross?

17 MR. CROSS: Yes, he did.

18 MR. OHLEMAYER: This is a different
19 question, different answer.

20 THE COURT: 24 is a different
21 question. Go ahead.

22 Q "Do you recall in the early 1970s reports

23 beginning to be published about the possible
24 association between exposure to secondhand
25 smoke and lung cancer?"

SLAUGHTER-RECROSS

2457

1 And your answer was "yes."

2 Do you recall that question and that
3 answer?

4 A Yes.

5 Q And then the next question, Do you recall
6 being asked whether that was something that
7 was widely reported at the time? And do you
8 recall your answer being, Well, you heard it
9 on the news and everything else, how could
10 you help but not know it. Do you remember
11 that question and that answer?

12 A Yes.

13 Q And then do you remember being asked whether
14 you had any discussions among the nursing
15 staff when these reports became or began
16 coming out, and your answer was only when
17 the policies changed.

18 A That's right.

19 Q And there were policies that the VA put out
20 about smoking in the hospital.

21 A In the late '80s.

22 MR. OHLEMEYER: That's all I have,
23 Your Honor.

24 THE COURT: All right. You may
25 step down. Thank you.

SLAUGHTER-RECROSS

2458

1 We'll take a 15-minute break at this
2 point. The jury will be excused.

3 We'll be back in 15 minutes but I need
4 to have the attorneys stay for a minute.

5 MR. CASSELL: All rise.

6 (Jury not present)

7 THE COURT: Jury is not now
8 present. Who conducted the interrogation of
9 Marilyn Bardsley yesterday on direct?

10 MR. CROSS: Mr. Cross.

11 THE COURT: I want to remind
12 everybody there is a separation order on all
13 witnesses. Part of that separation order
14 that I issued on February 6, once you have
15 testified and are excused by the Court, you
16 may not reenter the courtroom. Now, I
17 understand from the bailiff Mrs. Bardsley
18 was in the courtroom this morning. And only
19 the bailiff happened to see her and asked
20 her to leave, but she was in here during a
21 significant portion of this testimony. I
22 don't know whether Mrs. Bardsley will be
23 called again in this matter either by you or
24 by the defense. But I am here to tell you,
25 and that's why I put it in this order, I'm

SLAUGHTER-RECROSS

2459

1 going to rely on counsel. I'm not going to
2 have any more of these problems.

3 MR. JOSEPH YOUNG: Your Honor, if I
4 might --

5 THE COURT: That's all.
6 (A brief recess was taken.)
7 (Jury not present)
8 THE COURT: All right. We're back
9 on the record. Jury is not present.
10 Mr. Young, did you have a matter?
11 MR. JOSEPH YOUNG: No, Your Honor.
12 I just wanted to assure you that I saw Mrs.
13 Bardsley come into the court. I checked
14 with Counsel at counsel table on your order
15 to make sure and then I asked her to leave
16 and I don't believe it was any more than
17 five minutes. That would be my
18 responsibility, Your Honor, and I apologize,
19 but I wanted to make sure, and then I asked
20 her to leave, so I was attempting to comply
21 with your order to the best of my ability.
22 THE COURT: Thank you, Counselor.
23 My point, when these witnesses -- when you
24 talk to these witnesses, tell them this
25 order is in effect.

2460

1 MR. JOSEPH YOUNG: Yes, sir.
2 THE COURT: Who will be your next
3 witness?
4 MR. JOSEPH YOUNG: Be one of the
5 fact witnesses, and Mr. Cross has that
6 information.
7 THE COURT: All right.
8 MR. CROSS: Your Honor, the next
9 witness will be Mrs. Jean Lavengood, please.
10 And Mr. Motley will conduct the direct
11 examination.
12 THE COURT: All right.
13 MR. MOTLEY: Do you want her to
14 wait until the jury is in, Your Honor?
15 THE COURT: Please.
16 MR. MOTLEY: She is nervous.
17 MR. CASSELL: All rise.
18 (Jury present)
19 THE COURT: Be seated. Jury back
20 in its entirety, together with all three
21 alternates.
22 Mr. Motley, you may call your next
23 witness.
24 MR. MOTLEY: Ms. Jean Lavengood,
25 Your Honor.

2461

1 THE COURT: All right.
2 MR. MOTLEY: Go up there. The
3 Judge is going to swear you in.
4 THE COURT: Would you raise your
5 right hand.
6 PLAINTIFFS' WITNESS, MARTHA JEAN LAVENGOOD, SWORN
7 THE COURT: Have a seat right
8 there, please. Would you tell this jury
9 your name.
10 THE WITNESS: I'm Martha Jean
11 Lavengood.
12 THE COURT: Would your spell your
13 last name.
14 THE WITNESS: L-A-V-E-N-G-O-O-D.
15 THE COURT: Mr. Motley.

16 DIRECT EXAMINATION

17 BY MR. MOTLEY:

18 Q Would it be fair to stay you're scared to
19 death?
20 A Yes, it would.
21 Q You've been in a court of law before and
22 testified in a --
23 A No, I've not.
24 Q I'm going to try to get through this as
25 painlessly as possible and as quickly as
LAVENGOOD-DIRECT

2462

1 possible, but you must listen very carefully
2 to my questions. And if one of these folks
3 over here objects before you answer, you've
4 got to give the Judge a chance to rule.
5 Those are the rules. Okay? Will you try to
6 do that for us?

7 A I will.

8 Q State your name and, I hate to ask you this,
9 but your age for the record.

10 A Martha Jean Lavengood, and I'm 67.

11 Q Can you get up a little closer to the
12 microphone so we can hear a little bit
13 better.

14 Now, you said you were 67. Are you
15 retired?

16 A Yes.

17 Q Okay. Where do you live?

18 A I live at [DELETED]

19

20 Q What occupation -- are you still working?

21 A No, I'm not.

22 Q Are you retired?

23 A Yes, I am.

24 Q And what were you when you were working?
25 What did you do?

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1 A I'm a registered nurse.

2 Q And you carry that through your life. Just
3 because you retire, you still look at
4 yourself as a registered nurse, don't you?

5 A Yes, I am.

6 Q You were proud of that, weren't you?

7 A Yes, I am.

8 Q Tell the jury about where you went to
9 school.

10 A I went to school at Wishard Hospital in
11 Indianapolis, Indiana, which is -- was
12 General Hospital at the time I went.

13 Q And you took training there?

14 A Yes, I did.

15 Q Let's get right down to Mildred Wiley's
16 case, okay. Can you tell us, did you know
17 Mildred Wiley?

18 A I knew Mildred Wiley as a friend and as a
19 co-worker.

20 Q When did you first meet Mildred Wiley as a
21 co-worker and where?

22 A The first meeting I had with Millie was in
23 1954 at Home Hospital in Indianapolis -- or
24 excuse me, in Lafayette. She was a student

25 nurse and she was a night nurse on my shift
 LAVENGOOD-DIRECT

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1 or on my ward.
2 Q And did you ever work at any hospital with
3 Mildred Wiley other than the VA Hospital?
4 A Just at Home Hospital that one year.
5 Q That one year at Home Hospital?
6 A Yes.
7 Q Okay. And the jury has already heard
8 testimony about it from other witnesses, but
9 what kind of nursing did you do there?
10 A At?
11 Q Home.
12 A At Home Hospital? I was a pediatric nurse.
13 Q What kind of nurse was she?
14 A She was a student nurse at the time, and she
15 worked the whole hospital.
16 Q They did what's called rotate; right?
17 A She rotated from unit to unit, yes.
18 Q When did you next professionally meet
19 Mildred Wiley?
20 A In 1973 at the VA Hospital at Marion,
21 Indiana.
22 Q And how was it that you met her there?
23 A We were assigned to the same building.
24 Q And that would be Building 16?
25 A Right.

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1 Q Now, the jury has heard a lot about Building
2 16 and I don't want to repeat all that
3 again, okay?
4 A Okay.
5 Q But tell the ladies and gentlemen of the
6 jury, please, Ms. Lavengood, how long you
7 worked as a colleague, professional nursing
8 colleague of Mrs. Wiley.
9 A I worked with her from 1973 to 1976 and from
10 1986 to 1991.
11 Q All right. And both of these times were
12 Building 16?
13 A Yes, they were.
14 Q From 1973 to '76, you all were both nurses?
15 A Yes, we were. We were staff nurses.
16 Q And did you work the same shift sometimes?
17 A We did, during that time, would work the
18 same shift, yes.
19 Q Now, the jury has heard a lot about the
20 conditions there from '73 to '76. I'm not
21 going to ask you to go back into all the
22 detail of that, but those patients were
23 veterans, most of them were disabled?
24 A Yes, they were.
25 Q And large -- a large percentage of them

LAVENGOOD-DIRECT

2466

1 smoked?
2 A Yes, a large number of them.
3 Q And can you tell the ladies and gentlemen of
4 the jury that, from '73 to '76, just
5 generally in your own words describe the
6 conditions in the building from the

7 standpoint of smoke being in the air. Was
8 it in the air or not?
9 A Most of the time it was always smoke filled.
10 We put all the patients in a large what we
11 call the day room, and they were allowed to
12 smoke in this room. And it was -- when you
13 walked in there, a lot of times it was blue
14 with smoke.
15 Q Now, do you know what the term "chain
16 smoker" means?
17 A Yes, I do.
18 Q What do you understand that to mean?
19 A A person that continually smokes one
20 cigarette after another.
21 Q And were there any such as that amongst the
22 veterans between 1973 and 1976?
23 A Yes, there were.
24 Q Now, the fact of the matter, from 1973 to
25 1976, Ms. Lavengood, was there anywhere you

2467

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1 could get in Building 16 that you didn't run
2 into smoke?

3 A No, there wasn't.

4 Q Do you know what I mean when I say brand
5 names of cigarettes?

6 A Yes, I do.

7 Q Do you know of your own knowledge that there
8 are lots of different brands of cigarettes?

9 A Yes, I do.

10 Q Can you remember every brand of cigarette
11 that was ever at that VA Hospital?

12 A No, I can't.

13 Q Do the best you can. Just tell them what
14 you remember as best you can.

15 A Chesterfield, Lucky Strike, Camel, Pall
16 Mall, Salem, Winston. I have a list. May I
17 look at it? Right now that's all I can
18 recall.

19 Q Do you know what a cheat sheet is?

20 A Yes. I know what a cheat sheet is. That's
21 all I can remember right now.

22 Q Who made that list up that you got?

23 A I did.

24 Q When did you make it up?

25 A Mr. Howard called me one morning and said

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1 that he wondered if I could remember the
2 number -- the names of brand cigarettes that
3 were smoked at the VA.
4 Q And did you -- I'm sorry. Go ahead.
5 A And I made up a list for him.
6 Q Have you got that list for you?
7 A Yes, I do.
8 Q Can I have it?
9 A Yes, you may.
10 MR. MOTLEY: Mark it for
11 identification, Your Honor.
12 Q If I told you that your list contains the
13 name Marlboro and Philip Morris, would that
14 refresh your memory?
15 A Yes.

16 MR. MOTLEY: Move the list into
17 evidence, Your Honor.
18 THE COURT: Any objection?
19 MR. OHLEMAYER: At this point there
20 is, Your Honor. It's hearsay. There is no
21 foundation that it's prior recollection
22 recorded at a time. It's just a list. We
23 don't even know when the list was made or
24 how it was made.

25 Q Could you tell us when it was made?

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1 MR. OHLEMAYER: May I ask questions
2 for foundation?

3 THE COURT: Go ahead if you have a
4 question for objection.

5 MR. OHLEMAYER: Is it
6 Mrs. Levengood or Lavengood?

7 THE WITNESS: Lavengood.

8 MR. OHLEMAYER: My name is Bill
9 Ohlemeyer. Could you tell us when you made
10 this list?

11 MR. MOTLEY: Approximately.

12 THE WITNESS: It was this fall, but
13 I can't tell you exactly when.

14 MR. OHLEMAYER: This list that
15 they've marked as No. 23, you made this
16 fall?

17 THE WITNESS: I copied it from -- I
18 copied it from the list that I gave you --
19 gave the tobacco company at a deposition
20 that they took from me.

21 MR. OHLEMAYER: So what's been
22 marked as 23 isn't a list that you made --
23 tell me when you made this list, when you
24 wrote this list down.

25 THE WITNESS: I wrote that from
LAVENGOOD-DIRECT

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1 memory this morning.

2 BY MR. MOTLEY:

3 Q Is this list the best you can do today?

4 A Yes, it is.

5 Q Are you pretty nervous?

6 A Yes, I am.

7 Q And do you believe this to be honest and
8 true as best you can remember today?

9 A Yes, it is.

10 MR. MOTLEY: Your Honor, I move its
11 admission at this time.

12 THE COURT: Any objection?

13 MR. OHLEMAYER: Your Honor, under
14 803, I have no objection to her using it to
15 refresh her recollection, but unless we
16 offer it into evidence, it's not admissible.

17 THE COURT: Well, she can use that
18 list to refresh her recollection, but the
19 list itself could not come in unless -- he's
20 right -- unless they offer it.

21 Q You can't talk to me without talking to the
22 Court.

23 THE COURT: She can see the list.

24 Q Do you want some water?

25 A No.

LAVENGOOD-DIRECT

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1 Q Just read that into the record, okay?

2 A Philip Morris --

3 MR. OHLEMAYER: Excuse me, Your
4 Honor, she can use it to refresh her
5 recollection to answer questions he asks,
6 but I don't think she can read it into the
7 record.

8 MR. MOTLEY: I ask you to look at
9 803-5, Your Honor, it's not hearsay.

10 THE COURT: You can ask her to
11 refresh her recollection from that list and
12 she can tell us what her memory is of the
13 types of cigarettes that were at the VA.

14 Q Look at that list for a second, okay? Does
15 that refresh your memory that Philip Morris
16 and Marlboro were at the hospital when you
17 and Mildred Wiley were there together?

18 A Yes, they were.

19 Q Okay. Now, did there come a time --

20 MR. MOTLEY: Excuse me one second,
21 Your Honor, if I might.

22 Q Now, you -- excuse me, ma'am. You came back
23 and you worked with Millie from 1986 to
24 1991?

25 A Yes, I did.

LAVENGOOD-DIRECT

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1 Q Now, ma'am, the brands of cigarettes you may
2 remember, nervous as you may be, from 1986
3 to 1991, would they be the same or different
4 from that list that you just gave the jury?

5 A Some of them would have been the same and
6 there probably were new brands at that time.

7 Q But the ones you've read to the jury and you
8 told the jury about, they were there again
9 in 1986 to 1991?

10 A Yes, they were.

11 MR. WAGNER: Objection. That's
12 leading and suggestive, Your Honor. Leading
13 and suggestive.

14 THE COURT: Overruled.

15 Q They were there then, too, weren't they?

16 A Yes, they were.

17 Q Ms. Lavengood, listen carefully to this
18 question, if you don't mind. Prior to
19 Mildred Wiley getting sick with cancer and
20 dying, as a nurse, did you know, did you
21 personally know that smoke from other
22 people's cigarettes could cause lung cancer
23 and kill you?

24 MR. WAGNER: Well, Your Honor,
25 objection, prejudicial characterization.

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1 It's irrelevant as to what this witness knew
2 and I think Counsel should be admonished
3 about asking questions that have those kind
4 of characterizations in them, Your Honor.
5 We've heard about 15 of these.

6 THE COURT: That objection is

7 overruled as it goes to what training the
8 lady may have. You can answer the question.
9 A Could I hear the question?
10 MR. MOTLEY: Could the reporter
11 read it?
12 (The requested material was read by the
13 reporter.)
14 A No, I did not.
15 Q Did you leave the VA Hospital?
16 A Yes, I did.
17 Q When?
18 A In '76 the first time.
19 Q But I mean the second time.
20 A In 1991 after Millie's death.
21 Q Why did you leave the hospital?
22 MR. WAGNER: Objection, Your Honor,
23 as to why she left. It calls for
24 motivation, mental processes.
25 MR. MOTLEY: I don't understand
LAVENGOOD-DIRECT

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1 this motivation, mental process objection.
2 Your Honor, there is no such objection in
3 that rule book.
4 THE COURT: The objection is
5 overruled. You can tell us why you left in
6 '91.

7 MR. MOTLEY: Go ahead.
8 A I left in '91 to go up -- we moved away from
9 Marion, Indiana. My husband worked in Gary,
10 Indiana, as a teacher and I went to join
11 him.
12 Q Now, did you know Mildred and you were
13 friends with her?
14 A Yes, we were.
15 Q Just because you were friends with her,
16 would you tell this jury anything
17 untruthful?
18 A No, I wouldn't.
19 MR. MOTLEY: No further questions,
20 Your Honor.
21 THE COURT: Mr. Wagner.
22 MR. WAGNER: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. WAGNER:

25 Q Good morning, Mrs. Lavengood.
LAVENGOOD-CROSS

2475

1 A Good morning.
2 Q We've not met. My name is Richard Wagner.
3 I'm one of the attorneys for one of the
4 defendants in this case; a couple of the
5 defendants, actually.
6 As far as cigarette smoke is concerned,
7 that's something that you personally don't
8 like; right?
9 A No, I don't.
10 Q And you sit in the no-smoking section in
11 restaurants?
12 A Yes, I do.
13 Q And you wouldn't ride in a car with somebody
14 who is smoking; is that so?
15 A Yes, it is.

16 Q And you wouldn't sit in a room with anybody
17 that smoked?
18 A Not if I can help it.
19 Q And Mrs. Wiley was a close personal friend
20 of yours?
21 A We were friends, yes.
22 Q And Mr. Philip Wiley is a close personal
23 friend of yours?
24 A Yes.
25 Q And you and Mrs. Wiley saw each other

LAVENGOOD-CROSS

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1 socially and ate lunch together?
2 A Sometimes.
3 Q Went on religious retreats with her?
4 A Yes, we did.
5 Q And went out shopping together?
6 A Sometimes.
7 Q And like Mrs. Wiley, you also did missionary
8 work, isn't that so?
9 A Yes, I did.
10 Q And in 1973 Mr. Philip Wiley telephoned you
11 and asked you if you would be a witness for
12 him in this lawsuit against the tobacco
13 companies; isn't that so?
14 A In what year?
15 THE COURT: You said '73,
16 Counselor.
17 Q I'm sorry. 1993.
18 A Yes, he did.
19 Q And you told him you would be glad to do it;
20 right?
21 A I told him I would.
22 Q He telephoned you long distance from North
23 Carolina?
24 A Yes, he did.
25 Q Now, let me focus for a moment on your work

LAVENGOOD-CROSS

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1 at the Veteran's Administration Hospital so
2 I can get this straight. You worked at the
3 Veteran's Administration Hospital from 1971
4 to August of 1976; correct?
5 A That's correct.
6 Q And Mrs. Wiley began her work there in 1973;
7 right?
8 A That's correct.
9 Q So you only worked with Mrs. Wiley about
10 three years during that period of time;
11 right?
12 A That's correct.
13 Q And then from August of 1976 to October
14 1986, for ten years, you were not an
15 employee at the Veteran's Administration
16 Hospital; correct?
17 A That's correct.
18 Q Now, during the 1973 to 1976 period that you
19 worked in Building 16, you were there as a
20 staff nurse; right?
21 A Pardon me?
22 Q During the period 1973 to 1976, you worked
23 in Building 16?
24 A Correct.

25 Q You worked there as a staff nurse; correct?
LAVENGOOD-CROSS

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1 A Correct.
2 Q And you worked predominantly on Floor B;
3 right?
4 A Correct.
5 Q Floor B is the second floor?
6 A Yes.
7 Q And you spent about 90 percent of your time
8 on Floor B, the second floor; correct?
9 A Probably.
10 Q And Mildred Wiley worked about 90 percent of
11 her time on Floor A, the first floor;
12 correct?
13 A Probably.
14 Q And during this period 1973 to 1976, you and
15 Mrs. Wiley did not always work the same days
16 or the same shifts; did you?
17 A Usually.
18 Q Usually what?
19 A Usually we did work the same days and same
20 shift.
21 Q But there were days when you and Mrs. Wiley
22 did not work the same days and same shifts;
23 correct?
24 A Correct.
25 Q And during this period, 1973-1976, there was
LAVENGOOD-CROSS

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1 a head nurse in Building 16, wasn't there?
2 A Yes, there was.
3 Q And her name was Linda Caron?
4 A Linda Caron.
5 Q Caron. Linda Caron. And during that period
6 there was a nurse for each of the three
7 floors in Building 16; right?
8 A Yes, there was.
9 Q And there were two or three nursing
10 assistants on the first floor and three or
11 four on the second floor and two or three on
12 the third floor; right?
13 A I believe that's correct.
14 Q Now, let's go to the next period. You
15 returned to the Veteran's Administration in
16 1986; right?
17 A I returned in 1983. I didn't work on 16
18 until 1986.
19 Q All right. You returned to the Veteran's
20 Administration and began work in Building 16
21 again in 1986?
22 A Correct.
23 Q And you worked there until 1991.
24 A Correct.
25 Q And during that period of time you were the
LAVENGOOD-CROSS

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1 evening charge nurse in Building 16, weren't
2 you?
3 A Correct.
4 Q And so you worked nights.
5 A Afternoons.
6 Q Well, what shift is that, 3:00 to 12:00?

7 A Yes.
8 Q 3:00 p.m. in the afternoon until around
9 12:00 midnight?
10 A Correct.
11 Q During that period of time Mrs. Wiley was a
12 head nurse, wasn't she?
13 A Yes, she was.
14 Q And she worked days; right?
15 A Yes, she did.
16 Q Back in that period, 1973-1976, isn't it
17 correct, Mrs. Lavengood, that there were
18 only about 25 patients on Floor A, the first
19 floor?
20 A I don't really remember how many patients
21 were on it. I believe that to be so, but
22 I'm not sure.
23 Q Well, you remember telling us that was the
24 number of patients on the first floor in
25 Building 16 during 1973-1976 when we asked
LAVENGOOD-CROSS

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1 you that question in your deposition?
2 A I believe in that deposition I told you that
3 I thought that was how many that was there.
4 Q That was your best estimate; right?
5 A Right.
6 Q Thank you. And by the 1980s the patient
7 count in Building 16 was reduced, wasn't it?
8 A Yes, I believe so.
9 Q And it was reduced on all three floors;
10 right?
11 A Yes, it was.
12 Q And there were 21 patients, as best you
13 could recall, when you left the Veteran's
14 Administration.
15 A Correct.
16 Q Now, during the 1971 to 1976 period of time,
17 the nurse's station was first in a separate
18 office; isn't that correct?
19 A Yes, it was.
20 Q And then later -- it wasn't until later that
21 it was opened up and made a part of the day
22 room; right?
23 A About a year and a half to two years later,
24 I believe.
25 Q And actually the nurses spent very little
LAVENGOOD-CROSS

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1 time in the nurse's station; isn't that
2 correct?
3 A We spent most of our time in the day room
4 with the patients.
5 Q Well, my question is about the nurse's
6 station. You spent very little time in the
7 nurse's station.
8 A Correct.
9 Q And you didn't actually hang around the day
10 room all day long either, did you?
11 A We were where the patients were. If they
12 were in the day room, yes, we were.
13 Q The patients were in their bedrooms and the
14 rooms they were assigned to, you had to be
15 in there from time to time, did you not?

16 A We checked on our patients, yes.
17 Q You had to administer medications to them
18 and when they were in the rooms you had to
19 do that; right?
20 A Correct.
21 Q You had to chart?
22 A Correct.
23 Q Sometimes you had to take patients to other
24 places in the hospital?
25 A The nurses didn't do that.

LAVENGOOD-CROSS

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1 Q Who did that? The nursing assistants?
2 A Correct.
3 Q And you were a nurse and did you supervise
4 the nursing assistants?
5 A Yes, we did.
6 Q And that was one of your duties, to see that
7 the nursing assistants carried out their
8 duties; right?
9 A Correct.
10 Q Now, when Mildred Wiley became the head
11 nurse in Building 16, she got some new
12 responsibilities, didn't she?
13 A Yes, she did.
14 Q And when she was the head nurse, assisting
15 patients to smoke was not one of her
16 responsibilities; isn't that correct?
17 A No, that is not --
18 Q Well, do you remember when you were asked
19 that question in your deposition?
20 MR. MOTLEY: Excuse me, Your Honor,
21 the lady was trying to complete her
22 sentence. Counsel interrupted.
23 THE COURT: Did you complete your
24 answer?
25 MR. WAGNER: Go right ahead.

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1 A As a registered nurse, Millie was required
2 to do whatever the patients needed. That
3 was not one of her duties, but if she were
4 in the room with the patients or in the day
5 room with a patient and they wanted to
6 smoke, it would have been her duty to have
7 helped them.
8 Q My question was, Mrs. Lavengood -- perhaps
9 you didn't understand it. Let me rephrase
10 it.
11 After Mrs. Wiley became the head nurse,
12 when she was a head nurse, assisting
13 patients to smoke was not one of her
14 responsibilities; isn't that correct?
15 A No. It's the responsibility of a nurse even
16 as a head nurse. If a patient requests
17 something, she would help them.
18 Q Let me ask you if you remember being asked
19 this question and giving these answers in
20 your deposition taken in this case on
21 December 19, 1994, at pages 80 and 81:
22 "Question --"
23 This was about Mrs. Wiley and assisting
24 smokers.

1 responsibility as head nurse or would this
2 have been back in the earlier time period in
3 the '70s?

4 "Answer: Oh, it would have been
5 definitely during the '70s if no one else
6 was available. It would have been in the
7 other time frame, too.

8 "Question: Would it be fair to say
9 that during the '80s it would not be one of
10 her general responsibilities as head nurse
11 to assist the patients in smoking?

12 "Answer: Yes."

13 Do you remember giving those answers to
14 those questions, Mrs. Lavengood?

15 A That's right. But you asked me if as a
16 registered nurse she still, no matter what
17 her duties on her -- as a head nurse were,
18 she was still required to help the patients.

19 Q The answer that you gave to those questions
20 that were asked in your deposition were
21 accurate; isn't that right, Mrs. Lavengood?

22 A Yes.

23 Q As a nurse, did you have to feed the
24 patients?

25 A Yes, we did.

1 Q Administer medication to them?

2 A Yes, we did.

3 Q You had to check on the patients from time
4 to time?

5 A Yes, we did.

6 Q Doctors would come to the hospital from time
7 to time to see their patients?

8 A We only had one doctor per floor. Excuse
9 me. We had a doctor assigned to our
10 building.

11 Q And that doctor would come sometimes to see
12 his patients; right?

13 A Correct.

14 Q And you had to assist the doctor sometimes
15 while he did go see the patient?

16 A Not always.

17 Q I understand not always, but from time to
18 time you would go along with the doctor and
19 talk to the doctor about the patient; right?

20 A Yes.

21 Q Now, Mr. Motley asked you some questions
22 about your knowledge about certain things.
23 Actually you had discussions with Mrs. Wiley
24 in which you discussed your beliefs that
25 smoking was unhealthy, didn't you?

1 A Yes, I did.

2 Q But you're not aware that Mrs. Wiley ever
3 complained to anyone in the administration
4 at the Veteran's Administration about
5 smoking; isn't that correct?

6 A In the earlier times we talked among

7 ourselves. I don't know about the later
8 times. It was brought up at head nurse
9 meetings.
10 Q Listen closely to my question,
11 Mrs. Lavengood. My question is: It's a
12 fact, isn't it, that you're not aware that
13 Mildred Wiley ever complained to anyone in
14 the administration at the Veteran's
15 Administration Hospital about smoking.
16 Isn't that true?
17 A I don't know.
18 Q Well, do you remember you were asked in your
19 deposition that question, pages 130 to 131:
20 "Question: Did Mrs. Wiley ever
21 complain to anyone in the administration at
22 the Veteran's Administration Hospital about
23 the smoking that was going on there?
24 "Answer: I don't know whether she did
25 or not. I mean, they smoked -- all the
 LAVENGOOD-CROSS

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1 patients smoked in all the buildings."
2 Do you remember giving that answer to
3 that question?
4 A Yes.
5 Q Let's talk about some of the things that
6 relate to smoking there in the Veteran's
7 Administration Hospital, Mrs. Lavengood. Do
8 you recall that at some time prior to 1986
9 no-smoking areas were designated in that
10 hospital, don't you?
11 A Repeat that, please.
12 Q You recall that prior to 1986 no-smoking
13 areas were designated in the Veteran's
14 Administration Hospital?
15 A They were allowed to smoke anywhere, yes.
16 Q That's not my question, Mrs. Lavengood. My
17 question was: Do you recall that at some
18 time prior to 1986 no-smoking areas were
19 designated in the hospital?
20 A I don't understand your question.
21 Q You understand what a no-smoking area is?
22 A Yes.
23 Q Where people can't smoke.
24 A Right.
25 Q I'm talking now about the Veteran's
 LAVENGOOD-CROSS

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1 Administration Hospital.
2 A Yes.
3 Q And my question is: Do you recall that
4 prior to 1986 no-smoking areas were
5 designated in the Veteran's Administration
6 Hospital?
7 A There were no designated smoking areas prior
8 to 1986.
9 Q I'm talking about no-smoking areas prior to
10 1986. Do you remember that there were
11 places where you couldn't smoke in the
12 Veteran's Administration Hospital prior to
13 1986?
14 A No. Sir?
15 Q Yes, ma'am.

16 A They were not allowed to smoke in their
17 bedrooms at any time, if that's what you
18 mean.
19 Q Well, let me see if I can refresh your
20 recollection. At page 7 when you were asked
21 about these subjects -- I'm trying to figure
22 out where to start here.
23 "Question: In more recent time period
24 that you worked there --"
25 MR. HOWARD: Is there a line
LAVENGOOD-CROSS

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1 number?
2 Q Page 70, line 05. "The last year and a half
3 or two years I worked there, the nursing
4 assistants and the nurses had to go outside
5 to smoke. Last year would have been --" and
6 then the question: "It would have been the
7 1990, 1991 time frame or prior to that?
8 "Answer: Oh, it was probably 1990.
9 "Question: Nurses had to go outside to
10 smoke?
11 "Answer: All personnel had to go
12 outside. They had designated smoking areas.
13 "Question: And those were outside of
14 the building?
15 "Answer: Uh-hum, or on the carport.
16 "Question: Was there a smoking shack
17 that was built during that time you worked
18 there?
19 "Answer: No.
20 "Prior to that policy going into effect
21 for the personnel, what restrictions were
22 there with respect to smoking by the
23 personnel? I think you mentioned designated
24 areas.
25 "Answer: The designated area in the
LAVENGOOD-CROSS

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1 office and the break room.
2 "Question: How was that policy
3 communicated to the personnel?
4 "Answer: Written memos from the
5 office.
6 "Question: Do you remember that was a
7 policy that was in effect when you started
8 back in 1986? Is that correct?
9 "Answer: Yes."
10 Do you remember giving those answers to
11 those questions?
12 A I'm not sure of the time frame. I remember
13 giving that answer. I'm not sure of the
14 time frame when they first started
15 designating smoking areas. It would have
16 been sometime in, around that time, but I'm
17 not sure of the time.
18 Q Well, those are the answers you gave us to
19 those questions in your deposition, and that
20 was your best recollection at that time;
21 correct?
22 A That's right.
23 Q Do you recall that Mrs. Wiley had no
24 ashtrays in her office? Isn't that right?

25 A She did not.

LAVENGOOD-CROSS

2492

1 Q And, in fact, you recall Mrs. Wiley
2 requesting people not to smoke in her
3 office, don't you?

4 A Yes, I do.

5 Q And when you first started working at the
6 Veteran's Administration, at least 25
7 percent of the staff that worked there did
8 not smoke; isn't that right?

9 A Probably.

10 Q And all the visitors that came there didn't
11 smoke either, did they?

12 A Visitors smoked.

13 Q Every one of them that came there, did they?

14 A No.

15 Q During the entire time you worked at the
16 Veteran's Administration, patients were not
17 allowed to smoke in their bedrooms; right?

18 A That's true. That's true in any hospital.

19 Q And they weren't allowed to smoke in their
20 dormitory rooms?

21 A Well, the dormitory rooms and the bedrooms
22 are the same thing.

23 Q Same thing? And during the entire time you
24 worked at the Veteran's Administration,
25 patients were not allowed to smoke after

LAVENGOOD-CROSS

2493

1 9:00 p.m.; isn't that right?

2 A That's correct.

3 Q And some patients went to bed earlier than
4 9:00 p.m.; right?

5 A Sometimes.

6 Q And during the entire time that you've
7 worked at the Veteran's Administration,
8 patients were only allowed to smoke three or
9 four times each day.

10 A That's correct. But we had parties quite
11 frequently and they were allowed to smoke at
12 the parties.

13 Q And you recall that at some point
14 ventilation fans were put at each end of
15 Building 16; right?

16 A Yes, they were.

17 Q And the windows in Building 16 could be
18 opened?

19 A They were not -- at one time the
20 buildings -- the windows were nailed shut
21 and another period of time they could only
22 be opened by six inches. That was to
23 prevent suicides.

24 Q Do you recall telling us in your deposition
25 that the windows in Building 16 could be

LAVENGOOD-CROSS

2494

1 A opened if it was not real cold outside?

2 A In the earlier years I worked there they
3 could, yes. But not in the latter years.

4 Q You didn't tell us anything about the latter
5 years when we deposed you, did you,
6 Mrs. Lavengood?

7 A I didn't think about it.
8 Q Now, let me ask you about this list of
9 cigarettes that Mr. Motley asked you about.
10 Do you recall giving a deposition in this
11 case in December of 1994; right?
12 A Yes. It was some --
13 Q When you were deposed in this case in
14 December 1994, you said you could only
15 remember five brands of cigarettes that were
16 dispensed or smoked at the Veteran's
17 Administration Hospital, didn't you?
18 A That's correct. They were having me
19 remember things back 25 years before. I
20 didn't remember them.
21 Q And as to this list that Mr. Motley asked
22 you about, let me ask you some questions
23 about how you came up with that list.
24 Mr. Max Howard contacted you by phone
25 between September and October 18, 1997, to

LAVENGOOD-CROSS

2495

1 talk to you about that subject, didn't he?
2 A Yes, he did.
3 Q And there were two phone calls?
4 A There were three phone calls.
5 Q All right. Mr. Howard asked you if you
6 would sign an affidavit listing the brands
7 of cigarettes smoked at the Veteran's
8 Administration Hospital?
9 A Yes, he did.
10 Q And in that telephone call that you had with
11 Mr. Howard, you never told him the brands of
12 cigarettes he should put in the affidavit,
13 did you?
14 A I made up a list of cigarettes for him.
15 Q In your deposition when we deposed you, you
16 told us that you never told Mr. Howard the
17 brands of cigarettes he should put in the
18 affidavit, did you?
19 A I'm very much aware of that. If you'll
20 remember, I had been sick and had been in
21 the hospital on Tuesday before that. And
22 you people had me very confused.
23 Q All right. Well, you got a second call from
24 Mr. Howard and he brought the affidavit out
25 to you, didn't he?

LAVENGOOD-CROSS

2496

1 A Yes, he did.
2 Q Between that first and second call, you
3 didn't do anything to refresh your
4 recollection about the brands of cigarettes
5 that you thought were sold or used there at
6 the hospital, did you?
7 A I told you I made a list.
8 Q And when you made up that list -- let's
9 stick with this first time that Mr. Howard
10 came to you with the affidavit. He came out
11 to your house with an affidavit that he had
12 prepared and asked you to sign it, didn't
13 he?
14 A Yes, he did.
15 Q And you listed in that affidavit brands of

16 cigarettes; right?
17 A Yes, I did.
18 Q Howard was there in your home about 15
19 minutes?
20 A I don't recall how long he was there.
21 Q Now, in your -- in that affidavit you listed
22 seven brands of cigarettes. Right?
23 A Yes, I did.
24 Q And that list that you brought to court
25 today, three, six -- now you've got nine

LAVENGOOD-CROSS

2497

1 brands of cigarettes; right?
2 A That was a list I took to -- the day that
3 you took the deposition.
4 Q So if we total all these up, you've given
5 three different versions as to the brands of
6 cigarettes that were sold and dispensed
7 there at the Veteran's Administration
8 Hospital; isn't that so, Mrs. Lavengood?
9 A That's true, but I remember different ones
10 after thinking about it.
11 Q And as to all those brands that you've told
12 the jury about, it's true, isn't it, that
13 you don't know which of those brands were
14 smoked between 1971 and 1976; right?
15 A It would have been any of those brands
16 because not all the patients smoked the same
17 thing.
18 Q And you don't know which of those brands
19 were smoked from 1971 up to 1973 when Mrs.
20 Wiley started to work; right?
21 A Repeat the question, please.
22 MR. WAGNER: Withdraw the question.
23 Q You don't know what brands were smoked at
24 the hospital during the ten years from 1976
25 to 1986 while you weren't employed at the

LAVENGOOD-CROSS

2498

1 hospital; correct?
2 A Correct.
3 Q And in 1973-1976, you worked on the second
4 floor of Building 16; correct?
5 A Correct.
6 Q Mildred Wiley worked on the first floor?
7 A Correct.
8 Q And when you worked from 1986 to 1991, you
9 worked nights and Mrs. Wiley worked days;
10 correct?
11 A Correct.

12 MR. WAGNER: Your Honor, I believe
13 that's all I have.

14 THE COURT: Fine, Mr. Wagner.

15 Mr. Ohlemeyer, any questions?

16 MR. OHLEMAYER: Just a few, Your
17 Honor.

18 CROSS-EXAMINATION

19 BY MR. OHLEMAYER:

20 Q Mrs. Lavengood, my name is Bill Ohlemeyer,
21 and I represent three of the companies
22 Mr. Wiley has sued.

23 Do you know a nurse by the name of
24 Marilyn Bardsley?

25 A Yes, I do.

LAVENGOOD-CROSS

2499

1 Q And how is it you know her?

2 A I worked with her at the VA and I also run
3 around with her socially.

4 Q Do you know a nurse by the name of, is it
5 Mary Jane or Mary Slaughter?

6 A Yes, I do.

7 Q And when is the last time you saw either
8 Mrs. Bardsley or Mrs. Slaughter?

9 A This morning.

10 Q Did you have dinner with them last night?

11 A Yes, I did.

12 Q Dutch treat or did somebody get stuck with
13 the bill?

14 A I think -- I don't think that's necessary.

15 THE COURT: Answer the question.

16 A Dutch -- we didn't pay for the meal.

17 Q Mrs. Lavengood, am I correct that in July of
18 1995, before you -- before anyone took your
19 deposition in this case, Mr. Howard had you
20 sign an affidavit about the Veteran's
21 Administration Hospital?

22 A Yes, he did.

23 Q And that affidavit didn't say anything about
24 brands of cigarettes that were smoked at the
25 VA; right?

LAVENGOOD-CROSS

2500

1 A That wasn't brought up then.

2 Q But am I right?

3 A Correct.

4 Q So then in December of 1994, a deposition
5 was taken, right, where you were asked --

6 MR. MOTLEY: Excuse me, Your Honor,
7 I again ask for a 105 instruction. Counsel
8 well knows what that affidavit, the first
9 one was intended for, and I don't need to
10 say any more further here. I think Your
11 Honor knows what that affidavit was intended
12 for and Counsel well knows that. I think
13 that's unfair and I would ask for a 105
14 instruction.

15 THE COURT: We'll take the request
16 up at the break, Mr. Motley.

17 Go ahead, Mr. Ohlemeyer.

18 Q In December of 1994, your deposition was
19 taken; right?

20 A Yes, it was.

21 Q And Mr. Howard was present at that
22 deposition; right?

23 A Yes, he was.

24 Q And then in October of 1997 Mr. Howard
25 prepared the affidavit Mr. Wagner asked you

LAVENGOOD-CROSS

2501

1 about; right?

2 A Yes, he did.

3 Q And he typed that affidavit, not you; right?

4 A Yes, he did.

5 Q In fact, he misspelled your name a few
6 times, didn't he?

7 A Yes, he did.
8 Q And then a deposition was taken in November
9 of 1997; right?
10 A Around that time, I believe. I don't
11 remember the exact date.
12 Q And Mr. Howard and Mr. Young and Mr. Cross
13 were there, Mr. Wiley's lawyers; right?
14 A I believe so.
15 Q And Mr. Tittle, who took the deposition,
16 asked you to let him know if there were any
17 questions you didn't understand and he would
18 rearrange them or make it so it would make
19 more sense to you; isn't that right?
20 A Correct.
21 Q One other question, ma'am. You mentioned,
22 in a question Mr. Wagner asked you, you said
23 something about discussions you had had in
24 earlier times. Do you remember that -- my
25 question is what did you mean by earlier

LAVENGOOD-CROSS

2502

1 times?
2 A I don't know.
3 MR. OHLEMAYER: That's all I have,
4 Your Honor.
5 THE COURT: Mr. Motley, redirect?
6 REDIRECT EXAMINATION
7 BY MR. MOTLEY:
8 Q Are you okay? Do you want some water?
9 A No. That's all right.
10 Q Are you upset?
11 A It's okay.
12 Q Do you feel like you can go forward?
13 A Pardon?
14 Q Can you go on?
15 A Yes.
16 Q Have you ever heard of Disney World?
17 A Yes.
18 Q Would you tell me the -- if there was much
19 difference between Floor 1 and Floor 2 of
20 Building 16?
21 A You mean different from Disney World?
22 Q No. I was thinking about fantasy land but
23 what I mean was, you had nurses on Floor 1?
24 A Yes. They were the same.
25 Q You had patients on Floor 1?

LAVENGOOD-REDIRECT

2503

1 A Yes, we did.
2 Q You had doctors on Floor 1?
3 A Yes, we did.
4 Q You had visitors on Floor 1?
5 A Yes.
6 Q You had cigarettes on Floor 1?
7 A Yes, we did.
8 Q And people smoked those cigarettes?
9 A They did.
10 Q And they did all those things on Floor 2?
11 A Exactly.
12 Q Now, you were asked by Mr. Wagner about your
13 knowledge of Mildred Wiley outside of the VA
14 Hospital. Do you remember that?
15 A Yes, I do.

16 Q And you have known them since 1954, haven't
17 you?
18 A Yes, I have.
19 Q And he asked you when she was outside the VA
20 Hospital she avoided smoke. Do you remember
21 that?
22 A The period from 1954 to 1971 I was not
23 around Millie, but yes, I do know that she
24 didn't. We always ate in smoke-free areas.
25 Q But in 1954 you all were in the hospital

LAVENGOOD-REDIRECT

2504

1 together, weren't you?
2 A Yes, we were.
3 Q Was there smoking in the hospital then in
4 1954?
5 A Not in -- no, not in the unit I worked in
6 because it was a pediatric unit.
7 Q Where did she work?
8 A She rotated around the whole hospital, but
9 the smoking would have been -- there was no
10 open area of smoking, no.
11 Q And some of the parts of the hospital, even
12 though you were in pediatrics, there was
13 smoking in 1954, was there?
14 A Yes.
15 MR. WAGNER: Objection, leading.
16 She just --
17 THE COURT: Rephrase it. That was
18 leading.
19 Q Listen carefully now. When you were in the
20 pediatric ward, obviously the kids didn't
21 smoke.
22 A No.
23 Q Mildred Wiley was all over the hospital;
24 right?
25 A You're right.

LAVENGOOD-REDIRECT

2505

1 MR. OHLEMAYER: This is Mr. Motley
2 testifying.
3 MR. MOTLEY: I'm reorienting her to
4 her testimony in the interest of time.
5 THE COURT: It's all right, go
6 ahead.
7 MR. WAGNER: It's also outside the
8 scope of cross-exam. She wasn't asked about
9 whether there was any smoking at any other
10 hospitals during her cross-examination. She
11 was asked about her knowledge of Mrs. Wiley,
12 that she was friends, now we're going back
13 into her hospital days when she was a
14 student nurse in 1954, '55.
15 MR. MOTLEY: He asked her to her
16 personal knowledge did Mildred Wiley always
17 avoid smoking outside of the VA Hospital. I
18 think they brought it up and I'm entitled to
19 ask her about it.
20 THE COURT: The objection is
21 overruled. Go ahead.
22 Q Listen carefully. You were in the pediatric
23 ward?
24 A Yes.

25 Q No smoking there?

LAVENGOOD-REDIRECT

2506

1 A Yes.

2 Q Mildred Wiley was a student nurse?

3 A Right.

4 Q She went all over the hospital?

5 A Right.

6 Q To your personal observations in those other
7 parts of the hospital, not in pediatrics,
8 was there smoking?

9 A Yes, there was.

10 Q Now, you were asked about whether Mildred
11 Wiley and yourself knew that cigarette
12 smoking, though neither one of you smoked,
13 was unhealthy; do you remember that?

14 A Right.

15 Q Now, unhealthy, do you mean things such as
16 coughing?

17 A I knew it was an irritant to the respiratory
18 tract only.

19 Q And you don't call lung cancer an irritant
20 to the respiratory tract, do you?

21 A No.

22 Q You were asked some questions, ma'am, about
23 complaints. Do you remember that?

24 A Yes.

25 Q Whether Mildred complained?

LAVENGOOD-REDIRECT

2507

1 A Yes.

2 Q Do you remember testifying in your
3 deposition that --

4 MR. WAGNER: Excuse me, Your Honor.
5 It's not proper to ask a witness on direct
6 examination or redirect questions and
7 answers --

8 THE COURT: Sustained.

9 MR. WAGNER: Thank you.

10 Q Do you recall whether or not you and Mildred
11 Wiley had discussions, general discussions,
12 about being around smoke, that it was
13 irritating to you?

14 A Yes, we did.

15 Q Now, about all these brands that you were
16 asked about, okay, as you sit here today, do
17 you have a clue all the cigarette brands
18 that Mr. Wagner's client, RJ Reynolds, has
19 manufactured and distributed in Indiana
20 since 1954?

21 MR. WAGNER: Objection, Your Honor.

22 A Absolutely not.

23 MR. WAGNER: Excuse me. Move the
24 answer go out.

25 THE COURT: The answer will go out.

LAVENGOOD-REDIRECT

2508

1 MR. WAGNER: Improper question, no
2 foundation, irrelevant.

3 THE COURT: Overruled. You can
4 answer that question.

5 A I do not.

6 Q You don't have a clue, do you?

7 A No.
8 Q Do you know what a monopoly is?
9 MR. WAGNER: Well, Your Honor --
10 MR. OHLEMAYER: Objection, Your
11 Honor.
12 THE COURT: Sustained.
13 Q You were asked about patients going to bed
14 at 9:00. Do you remember that?
15 A Yes.
16 Q Are veterans -- when the veterans went to
17 bed at 9:00, were they strapped in their bed
18 or something?
19 A No, they're not.
20 Q Are they like normal people? Do they get up
21 sometimes?
22 A Some of them did, yes.
23 Q Did some of them go to the day room?
24 A Yes, they did.
25 Q And the nurses who were there, they didn't

LAVENGOOD-REDIRECT

2509

1 go to bed at 9:00; the ones who are on night
2 shift didn't go to bed at 9:00, did they?
3 A No.
4 Q In your presence did they smoke, some of
5 them?
6 A Yes, they did.
7 Q Now, do you really remember -- remember you
8 talked to me about chain smoking, what that
9 was?
10 A Yes.
11 Q He asked you they only smoked about three or
12 four times a day. Do you remember that
13 question?
14 A Yes.
15 Q Do you really, as you sit here today, back
16 in the '70s and '80s, did you count up the
17 number of cigarettes those veterans smoked
18 every day?
19 A No, we didn't. Part of the patients could
20 smoke on their own.
21 Q And as far as this list is concerned,
22 Mrs. Lavengood, are you trying -- are you
23 doing the best you can?
24 A Yes, I am.
25 MR. MOTLEY: I have no further

LAVENGOOD-REDIRECT

2510

1 questions. Thank you.
2 THE COURT: Thank you, Mr. Motley.
3 Mr. Wagner, anything further?
4 MR. WAGNER: We have no further
5 questions, Your Honor.
6 THE COURT: Mr. Ohlemeyer.
7 MR. OHLEMAYER: No.
8 THE COURT: Thank you very much,
9 ma'am, you may step down.
10 Call your next.
11 MR. CROSS: Plaintiffs would call
12 Beth Kreider.
13 May I ask, while my colleague is
14 retrieving her from the other room, how long
15 the Court wishes to go before the noon

16 break?
17 THE COURT: I think they bring the
18 jurors' meals around noon.
19 MR. CROSS: Would you like me to
20 close at that point in time? I will
21 probably go a little longer than 15 minutes.
22 THE COURT: We'll see how we're
23 doing.
24 MR. CROSS: Okay.
25 THE COURT: Raise your right hand.

LAVENGOOD-DIRECT

2511

1 PLAINTIFFS' WITNESS, BETH KREIDER, SWORN
2 THE COURT: Have a seat right
3 there, please. Would you tell this jury
4 your name.
5 THE WITNESS: Beth Kreider.
6 THE COURT: Spell your last.
7 THE WITNESS: K-R-E-I-D-E-R.
8 THE COURT: Thank you.
9 Mr. Cross.
10 MR. MOTLEY: Excuse me, may I
11 approach Mr. Cassell? The lady ran off with
12 the list and he asked me to get it.
13 THE COURT: Thank you, Counselor.
14 Go ahead, Mr. Cross.
15 MR. CROSS: Thank you.

16 DIRECT EXAMINATION

17 BY MR. CROSS:

18 Q Mrs. Kreider, you are a married lady, are
19 you not?
20 A Yes.
21 Q And you are something of a newlywed; isn't
22 that true also?
23 A Yeah. Few months.
24 Q And, in fact, you gave a deposition -- you
25 submitted some affidavits and some

KREIDER-DIRECT

2512

1 depositions in this case at various times
2 and you were going by another name in those
3 days?
4 A Yes.
5 Q What was your former name?
6 A My name was Beth Brewer.
7 Q Now, Mrs. Brewer, where do you live? I'm
8 sorry, Mrs. Kreider, where do you live?
9 A That's okay.
10 Q I forgot already.
11 A I forget sometimes too. I live in [DELETED]
12 or in the rural area around [DELETED]
13
14 Q And for those people who aren't from the
15 [DELETED] area, can you tell them generally
16 where [DELETED] is?
17 A Probably about 10, 12 miles west of [DELETED]
18 and possibly about 15 or 20 miles from
19 [DELETED]
20 Q Are you employed at this time?
21 A Yes, I am.
22 Q What you do?
23 A I'm a home health aid mentor, an aid for
24 Visiting Nurse Association, North Central,

25 Indiana, which is headquartered in Elwood,
KREIDER-DIRECT

2513

1 Indiana.

2 Q Let me ask you first, how long have you been
3 doing this kind of work?

4 A Home health aid work?

5 Q Yes.

6 A For probably eight, ten years.

7 Q What kind of work is that? What do you do?

8 A We go into the people's homes, help them in
9 their homes with their personal care or with
10 their housekeeping needs or things like this
11 to help them be able to independently stay
12 in their home and keep them out of long-term
13 care facilities.

14 Q How long have you worked in the health care
15 field, Mrs. Kreider?

16 A About 22 years.

17 Q But you started out in another field, did
18 you not?

19 A Other than the health care field?

20 Q Yes.

21 A I was a schoolteacher before that.

22 Q Where were you a schoolteacher?

23 A Different places. I taught in parochial
24 schools.

25 Q And was that here in Indiana?

KREIDER-DIRECT

2514

1 A In Indiana and in Henderson, Kentucky.

2 Q And what grades or classes did you teach?

3 A Elementary grades and multiple-grade
4 classrooms where we allowed the students to
5 work at their own level and progress as
6 independently as possible.

7 Q There came a time, did there not, when you
8 came to work at the Veteran's Hospital in
9 Marion, Indiana?

10 A Yes.

11 Q Could you tell the jury when that was?

12 A February of 1976.

13 Q February of 1976. How did you come to be
14 employed by the Veteran's Administration in
15 Marion?

16 A Well, my mother had passed away, and I moved
17 back to the Grant County area to be with my
18 father and to help care for my elderly
19 father. And I had several friends who
20 worked out there, and made me aware of the
21 benefits and the job security, so I applied
22 with the Civil Service Task and took the
23 civil service exam to be hired at that time.

24 Q Did you pass the exam?

25 A Yes.

KREIDER-DIRECT

2515

1 Q And you were hired in February of 1976?

2 A Right.

3 Q What position were you applying for?

4 A I hired in as a nursing assistant because
5 that was basically the fastest way to get
6 hired in there, and my intentions were to go

7 into their educational therapy department at
8 a later date which I never did.
9 Q How long did you work as a nurse's assistant
10 at the VA?
11 A Totally, probably about five years. I left
12 nursing service and worked in medical
13 supplies for about 12 years.
14 Q And can you give us some rough dates as to
15 when -- let me ask you this: Did you
16 eventually retire or leave the employment of
17 the VA?
18 A I resigned from the VA in 1994.
19 Q And did you work at the VA continuously from
20 '76 to '94?
21 A Yes.
22 Q And now, could you please outline for the
23 jury what you did during those 18 years?
24 A The first few years that I was there, I
25 worked in nursing service as a nursing

KREIDER-DIRECT

2516

1 assistant. I left nursing service and went
2 into what in the real world is called
3 central supply, at the VA it was called
4 supply processing distribution, where we
5 handled and dispensed the medical supplies
6 to the units. If it was needed for patient
7 care and was not a pharmaceutical item, then
8 we probably handled it through our
9 department.

10 Q And then you say you did that for 12 years.
11 A Yes.
12 Q Then what happened? What did you do after
13 the 12 years?
14 A Well, it was in 19- -- late '89 or '90 that
15 my husband was in very poor health at that
16 time, and I needed to be home in the daytime
17 more so that I could be with him. So I
18 asked to be reassigned to nursing service so
19 that I could work off tours.
20 Q And what job did you then have?
21 A I applied for a nursing assistant's position
22 and asked and voluntarily signed papers
23 asking to be reassigned as a nursing
24 assistant from supply.
25 Q And was that essentially the same type of

KREIDER-DIRECT

2517

1 work you had in the first couple years you
2 were there?
3 A Yes.
4 Q While you were in supply, did you obtain any
5 management position?
6 A While I was in supply I became the
7 supervisor of central -- of SPD, of central
8 supplies.
9 Q And how long were you the supervisor of that
10 department at the VA?
11 A Probably about nine, ten years.
12 Q Now let's go back to the beginning. The
13 first few years that you were at the VA
14 Hospital you were a nurse's assistant. Is
15 that the same thing as a nurse's aide?

16 A Right.
17 Q Could you tell the jury what your job
18 responsibilities were as a nursing
19 assistant?
20 A Basically we did the patient care, depending
21 on whether -- what type of ward you were
22 working on, you might have more hands-on
23 care. If you were working in a psychiatric
24 care unit, which was an ambulatory psyche
25 unit, you might have less hands-on care but

KREIDER-DIRECT

2518

1 be with the patients to supervise them and
2 be with them during their duties.

3 If you were on a total care unit, which
4 I worked on more of -- as a regular basis,
5 you helped them with their personal care.
6 Many of the patients were bedfast or
7 wheelchair bound. Some of them had to be
8 fed, some of them had to be shaved, some of
9 them had to have everything done for them.
10 It just depended on what unit you were on at
11 the time.

12 Q Did you ever have any experience in Building
13 16 of the VA Hospital?

14 A During the first part of my work as a
15 nursing assistant, I was not assigned to
16 Building 16. But we pulled relief and I
17 really -- you know, if they were short of
18 help, we might be sent there, but I really
19 couldn't tell you what buildings I was
20 assigned to on relief work at that time.

21 Q In the first two years or so?

22 A During the first years that I worked in
23 nursing.

24 When I went back into nursing in '89 or
25 '90, I was assigned to Building 16 as a

KREIDER-DIRECT

2519

1 nursing assistant.

2 Q Full-time?

3 A Full-time.

4 Q And the first couple years, is it fair to
5 say that you were pretty much all over the
6 hospital?

7 A You're pretty much all over the hospital,
8 yeah, because if you have overstaffing and
9 someone has call-ins, then you work on their
10 units.

11 Q During that -- well, let's go to the time
12 that you were in supply then. What was the
13 nature of your duties in supply initially as
14 just an employee and then as a supervisor
15 during the years 1977, '78 to 1990 or
16 whenever it was -- does that sound
17 approximately correct on the dates?

18 A Yeah. While working in supply we would go
19 to each nursing unit of the facility and
20 inventory their stock of medical supplies
21 and then go back to the supply unit, pull
22 the supplies from the stock, or someone
23 would pull them and they would be delivered
24 to the unit and restock the assigned areas

25 where supplies were stored.

KREIDER-DIRECT

2520

1 That was my initial duties when I went
2 into supply, was as a supply clerk, doing
3 this, a medical supply clerk, doing the
4 inventories and stocking of the supplies.

5 Q So you would actually physically be involved
6 in the process of distributing supplies to
7 the various buildings?

8 A Right.

9 Q Did that include Building 16?

10 A Yes.

11 Q How often would you have occasion to go to
12 Building 16 during those days?

13 A Sometimes you might be on a unit like that
14 several times in one day because of the type
15 of patients they had and the amount of
16 supplies they used. You might be there
17 several times. Or they might get a new
18 patient that needed supplies that they
19 didn't normally use, so you might be on the
20 same unit half a dozen times in a day.

21 Q Did you have occasion to go out into the
22 hospital buildings after you became a
23 supervisor?

24 A As a supervisor, I was a working supervisor,
25 and I worked with my people and with the

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1 nurses to try to give them the supplies they
2 needed to their satisfaction and to the best
3 of patient care, so yes, I probably was on
4 the units as much as before and on a regular
5 basis. I was probably in my office less
6 than I was on the wards.

7 Q So with specific reference to Building 16
8 during the years that you worked in supply,
9 approximately how often would you get into
10 Building 16?

11 A I was probably there maybe six, eight times
12 a week at least.

13 Q Now, during that experience as a nurse's
14 aide after you first got there and then up
15 until 1980 when you worked in supply and
16 then even thereafter, I believe you said you
17 were in Building 16 when you went back to
18 being a nurse's aide; correct?

19 A Right.

20 Q During that experience at the hospital, did
21 you have an opportunity to observe the type
22 of patients that inhabited Building 16?

23 A Yes.

24 Q What can you tell the jury about the kind of
25 people that were hospitalized there?

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1 A On Building 16 it was kind of an
2 intermediate medical psyche unit. They were
3 the patients who were maybe less ambulatory
4 than they had been at one time. They might
5 even be patients that have been at the
6 hospital for a number of years and maybe

7 been on what we call outside buildings
8 because they were not connected to the
9 inside corridor, and they might have gotten
10 older. Obviously they had gotten older, but
11 they might have lost some of their abilities
12 to ambulate on their own or their health
13 problems might have caused them to need
14 closer supervision, so they were housed in
15 the units that had connecting corridors.

16 Q How would you generally describe them, again
17 throughout the years you worked and had some
18 contact with the patients there, from the
19 time you first started work until you ended?
20 That's the class of patients that were there
21 during that entire period?

22 A I think over the years they probably became
23 more of a -- it changed because, partially
24 because of remodeling projects and they cut
25 the patients' beds down because they had

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1 less open wards, so to speak, and more
2 private two- and three-bed units for the
3 guys. And also they piped in oxygen and air
4 to the units, so they could take care of
5 more of the respiratory problems in that
6 area.

7 So as the years developed, that became
8 more of a long-term medical unit where the
9 guys still probably had psychiatric problems
10 but they had more medical problems along
11 with their psychiatric problems.

12 Q Would you tell the jury what you personally
13 observed in terms of the smoke conditions
14 that existed in Building 16 while you worked
15 in the hospital?

16 A It was a very smoke-filled building because
17 entering that ward from the corridor you
18 went into the open area which led you into
19 the day room which was where the guys
20 smoked. It would meet you with a cloud of
21 smoke. I mean, you know, you could see it
22 when you walked in. Sometimes it was hazy.
23 It would -- just depended on how many guys
24 were in the day room smoking at the time.

25 Q How would you compare the smoking -- how
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1 would you compare the smokey atmosphere in
2 Building 16 to other places you've been in
3 your life?

4 A Most places I've been haven't been
5 smoke-filled areas until I went to the VA to
6 work. But that building probably was as
7 smokey as any building unless you were on a
8 locked psychiatric unit where the guys were
9 confined totally to the building and
10 couldn't leave it at all.

11 Q As a nurse's assistant, did you ever engage
12 in the process of assisting the patients
13 smoking?

14 A That was part of our job, was to -- many of
15 the patients on Building 16 and the building

16 138 where I had worked prior were patients
17 who, because of their conditions maybe
18 couldn't carry their cigarettes, so they
19 were kept in the nurse's station, and we
20 gave them cigarettes at assigned times or
21 when they had time. Or if they needed
22 supervision, when you had time to sit down
23 with them while they smoked a cigarette.
24 And we would dispense the cigarettes to
25 them. And some of them you had to hold

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1 their cigarettes for them while they smoked
2 them.

3 Q Mrs. Kreider, I want to draw your attention
4 to one particular patient that you and I
5 have discussed in the past, and recognizing
6 that there is a matter of patient
7 confidentiality, we won't mention his name.
8 But are you familiar with this -- do you
9 know the gentleman to whom I'm referring?

10 A You're probably referring to the one I told
11 you about that would clinch the cigarette so
12 tight in his mouth that you would burn your
13 fingers trying to remove it from his mouth.

14 Q What was the nature of this gentleman's
15 physical condition?

16 A He was a total -- total care quadriplegic.
17 He had movement of his head, neck. He could
18 lift his arms, but he had no body control.
19 He was a Vietnam veteran who had been in
20 Vietnam.

21 Q So he was -- what does the term
22 "quadriplegic" mean?

23 A Total paralyzation, mainly no control of his
24 body and muscles.

25 Q And he was then unable to put cigarettes in

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1 his own mouth?

2 A No.

3 Q Did you assist this gentleman in smoking?

4 A Yes, frequently. In fact, this particular
5 patient that we're talking about was on
6 Building 138 when I first went there to work
7 and he was on 16 when I was reassigned to
8 16. His condition had worsened where he had
9 been moved from 138 to the other building.

10 Q When you were first involved in the process
11 of assisting this gentleman, this veteran in
12 smoking, approximately how many times a day
13 would he have a cigarette?

14 A Anytime he could con somebody into giving
15 him one because he would sit and yell for
16 cigarettes. Most of the time, and because
17 of his condition and because of his age,
18 most of us felt kind of sorry for him. He
19 didn't have much in life to look forward to
20 because he was young and that was the one
21 thing that he did enjoy. That and his food,
22 because he was blind also.

23 Q Was this gentleman still alive when you left
24 the hospital?

25 A Yes, he was.

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1 MR. OHLEMAYER: I have an objection
2 to this based on foundation and relevance.
3 If I might ask the witness a question to
4 support the objection, it might make sense
5 to the Court.

6 MR. CROSS: I've essentially
7 concluded this.

8 THE COURT: That objection is
9 overruled.

10 Go ahead, Mr. Cross.

11 Q I just wanted to ask you, you mentioned that
12 you burned your fingers?

13 A Yes.

14 Q How does that happen? How do you get your
15 fingers burned?

16 A He would clinch the cigarette so tightly in
17 his teeth that you would have to pry it out
18 and you could burn yourself when you were
19 doing this to take the cigarette butt away
20 from him.

21 Q Did that happen to you?

22 A That has happened to me on occasion, yes.

23 Q Are you aware of any artificial mechanical
24 devices which were used to assist the
25 patients of Building 16 in smoking?

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1 A I really don't know if they were using it on
2 16. I really don't remember. You're
3 probably talking about what we referred to
4 as smoking robots that we purchased while I
5 was working in supply service, and this was
6 an ashtray that had a cigarette holder on
7 the ashtray. You attached the cigarette to
8 that and then you had like a three-foot tube
9 or hose that went into the patient's mouth
10 and you lit the cigarette and they were able
11 to smoke it. But as long as they could hold
12 that in their mouth themselves, they could
13 smoke it without someone actually having to
14 hold the cigarette for them.

15 Q Were these devices put into use at the
16 hospital?

17 A They were put in on a trial basis. We
18 purchased 12 of them through connections we
19 had with the Hines Veteran's Hospital, which
20 was a rehab hospital in Chicago. They were
21 not -- we never purchased any more of them
22 because of the sanitary conditions and the
23 problems involved in using them, because
24 each patient would have had to have had his
25 own tube, so to speak, and it was kind of a

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1 hassle, the staff felt, to do that.

2 Q Did you know Millie Wiley?

3 A Yes, I did.

4 THE COURT: I don't think she
5 answered your last question. He asked you
6 whether or not these were put into use in

7 the hospital.
8 A They were put into use, but only the 12 that
9 we bought for the evaluation. They were not
10 purchased and kept as a stock item which we
11 would call putting them into use because
12 they were stocked and available upon
13 request. The 12 we purchased may still be
14 in the hospital somewhere, but we never
15 purchased any more than the initial 12 that
16 were purchased to evaluate.

17 THE COURT: All right. Thank you.

18 Q Did you know Millie Wiley?

19 A Yes, I did.

20 Q How did you know her?

21 A I knew her as a staff nurse when I worked in
22 supply, because she was frequently the
23 charge nurse on her building, and she was
24 one of the people that I worked with in
25 stocking supplies, and she would be one that

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1 would requisition supplies from central,
2 from SPD.

3 Q During the years, the 12 years you were
4 working in supply and you would have
5 occasion to go to Building 16, how many of
6 those times each week that you would go to
7 Building 16 would you have to discuss
8 something with her?

9 A That would vary greatly depending on whether
10 she happened to be the charge nurse for the
11 day or not, in charge of the unit, or
12 whether we were doing a special product
13 evaluation that she had been placed in
14 charge of. So it would -- you know, I
15 probably saw her every few days, but it
16 would depend on what I was doing and what
17 she was doing -- what she was assigned to
18 that day whether I spent a lot of time with
19 her.

20 Q Did you get on a first-name basis with her?
21 A Yes, but I was on a first-name basis with
22 most of the nurses.

23 Q In the entire hospital, or just Building 16?
24 A Yes, all of the hospital.

25 Q Did you have occasion to observe her and her
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1 conduct of herself as a nurse?

2 A Yes.

3 Q How would you describe that to the jury?

4 A She was a very dedicated, conscientious
5 person who cared for her patients and was
6 concerned that they be cared for properly
7 and that things be done for them in a timely
8 manner, according to their needs.

9 Q During the time that you worked at the
10 Veteran's Administration Hospital, was it
11 required that any time that you take classes
12 or receive additional training?

13 A Yes. We had constant inservices, I think
14 monthly inservices in nursing service.

15 Q While you were a nurse's assistant?

16 A Right.
17 Q Tell the jury what inservice, what you mean
18 by that.
19 A An inservice would be maybe an hour,
20 two-hour session on something concerning
21 patient care, ask or maybe learning to help
22 them be more independent by exercise or
23 proper ways to lift and things like that.
24 And then once a year we had a full,
25 one-day seminar or training session which we

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1 got our CPR certification, practiced the
2 Heimlich maneuver and worked with dealing
3 with a combative psychiatric patient and how
4 to handle the psychiatric patients without
5 getting hurt.

6 Q During any of those courses or training
7 programs, was the subject of the health
8 hazards associated with secondhand smoke
9 ever discussed?

10 MR. WAGNER: Objection, Your Honor,
11 relevancy.

12 THE COURT: Overruled. You can
13 answer that.

14 A Not specifically that I recall, no.

15 Q Thank you.

16 Now I want to take you to the time that
17 you were in supply. Can you tell the jury
18 generally how cigarettes would come into the
19 VA Institution and then were distributed to
20 the various wards for the patients that
21 smoked?

22 THE COURT: Actually, before we do
23 that, they tell me the jury's lunch is here,
24 so I think we'll take a break at this point.

25 Ma'am, you may step down. We'll see

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1 you again at 1:15.

2 (Standard admonition)

3

4 THE COURT: We'll start again at
5 1:15, Counsel.

6 MR. CASSELL: All rise.

7 (Jury not present)

8 THE COURT: All right. Jury is not
9 present.

10 Mr. Motley, you had a request for a
11 special instruction?

12 MR. MOTLEY: Your Honor, this is
13 really unfair to the plaintiffs here. These
14 lawyers are good lawyers, they know better
15 than to bring up, keep insinuating the VA
16 claim into this proceeding. There's an
17 exclusive remedy mandated by federal law.
18 What they're trying to do is have it both
19 ways. They want to blame the VA, and the
20 only way they can blame the VA -- and I'm
21 not an Indiana lawyer, Your Honor, but I've
22 tried cases in Indiana before. And I
23 believe under the law applicable to this
24 case, you've got to prove that the sole

25

fault here was the Veteran's Administration
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1 or the Veteran's Administration's negligence
2 or whatever they're trying to insinuate here
3 is not relevant at all. And to interrogate
4 this lady when they either knew or should
5 have known, and if they don't know, I would
6 be surprised, that under the Veteran's
7 Administration regulation, she didn't have
8 to identify the products, that there was no
9 requirement. That's not a products
10 liability claim. That's like a Worker's
11 Comp claim, and all they had to do was
12 describe the circumstances, the extent and
13 the disease and satisfy the other
14 administrative requirements.

15 To stand up here and cross-examine this
16 woman when she had absolutely no obligation
17 to have placed in there, and it was not
18 relevant to the inquiry at the time, what
19 products are in there is just another
20 example; and I hope you'll forgive me, Your
21 Honor, but every time they want to do this,
22 I want to bring it to Your Honor's attention
23 because it's having a cumulative effect. I
24 would respectfully ask Your Honor at some
25 point in time a 105 instruction during this

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1 case is appropriate, to let this jury know,
2 before they wander down that wrong path,
3 which would not be fair to anyone in this
4 courtroom, and think that the VA's -- that
5 this lady has a claim, to wind the VA to
6 this courtroom, she's precluded from federal
7 law bringing them in here. For these
8 defendants to hide behind this is
9 unforgivable in my humble opinion, although
10 I know opinions aren't usually humble.

11 THE COURT: Thank you, Mr. Motley.

12 MR. OHLEMAYER: If I may, Your
13 Honor. This is all precipitated by an
14 affidavit that was prepared by Mr. Wiley's
15 lawyers, signed by these witnesses, provided
16 to their experts in this case, attached to
17 motions and pleadings they have filed in
18 this case, sworn to by the witness. It's a
19 fair cross-examination.

20 If they want to come in here and have
21 the jury believe that these women remembered
22 all of these brands without any prior
23 thought or any prior participation, I mean,
24 it all goes to credibility, and the Court
25 has wide discretion on credibility. And I

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1 thought we were very careful about how we
2 did what we did, but that affidavit has been
3 part of this case since the minute this case
4 was filed. They've given it to all their
5 experts and had them rely upon it and it
6 forms the basis of some of their opinions.

7 I don't think Mr. Motley -- I'm not going to
8 say anything.

9 THE COURT: Mr. Howard?

10 MR. HOWARD: Your Honor, that
11 affidavit was attached to the Worker's Comp
12 claim along with an affidavit of Carol
13 Pfizer and along with another affidavit.
14 That affidavit came from the Worker's Comp
15 file. That's where they got it. When they
16 got the Worker's Comp file, they only took
17 three depositions in this case. They took
18 the deposition of Slaughter, Lavengood and
19 Pfizer, and those were the affidavits that
20 were filed in Worker's Comp.

21 And Worker's Comp had nothing to do
22 with brand identification, and they've
23 cross-examined them in their depositions and
24 all that, why, and here in Court to try to
25 impeach them to show that they gave a

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1 different affidavit one time and sworn
2 statement to the contrary.

3 That's the only three people they knew
4 to depose, and the way they got that was
5 from the Worker's Comp file. They knew
6 where that came from when they asked that
7 question. There was one place it came from,
8 the Worker's Comp.

9 It doesn't matter that we later gave it
10 to experts and they used it for information,
11 because the experts weren't interested in
12 brand identification either. They were
13 trying to get some idea of the exposure.

14 So for Mr. Ohlemeyer to stand up and
15 say that was part of our case, that was part
16 of our Worker's Comp case, and that was it.
17 And that's the way they knew about it, and
18 they're using that to try to impeach the
19 witnesses.

20 MR. WAGNER: Your Honor, we are
21 entitled to impeach the witness with prior
22 inconsistent statements. That's so
23 rudimentary, I don't know how that can even
24 be an issue.

25 THE COURT: I understand.

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1 MR. WAGNER: And no mention was
2 made by Mr. Ohlemeyer about Worker's
3 Compensation claims at all. The affidavits
4 that these witnesses have been mostly asked
5 about were affidavits that were submitted to
6 you to support or rather to fend off, if you
7 will, the summary judgment motions that we
8 made based upon lack of product
9 identification. That's where those
10 affidavits came from. And they have given
11 different testimony in depositions and those
12 affidavits submitted to Your Honor, and the
13 testimony that they've given in court today
14 about how many brands they could remember
15 being sold and used in the hospital.

16 Now, surely we're allowed to get into
17 inconsistent statements. What could be more
18 rudimentary? And no mention has ever been
19 made about Worker's Compensation claims or
20 anything else. Mr. Motley just keeps
21 wanting to hammer away at this, keep
22 hammering away at it.

23 And one other thing on this proximate
24 cause thing, Your Honor. We are entitled to
25 argue to the jury that we are not the

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1 proximate cause of this lady's injuries. I
2 mean, it's an elementary proposition of law
3 under any legal theory, and what we have in
4 this case is strictly a products liability
5 theory, and the plaintiffs have to prove
6 that the defendants manufactured a
7 defective, unreasonably dangerous product
8 that proximately caused this lady's
9 injuries.

10 Now, we're allowed to get into these
11 things without Mr. Motley getting up and
12 jumping up and down every 15 minutes saying
13 we opened the door to something else or he
14 needs a limiting instruction.

15 MR. HOWARD: Just one more comment.
16 That's a word game, "inconsistencies." They
17 tried to show an inconsistency because it
18 was incomplete, that it didn't contain
19 information that wasn't required, and that's
20 the very point of it. They tried to use
21 something; they knew it wasn't required.
22 And for them to show, try to use that
23 document to impeach our witness by showing
24 an inconsistency because it didn't have that
25 information in it. It wouldn't have had

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1 that information in it. It would not have
2 been pertinent to those proceedings. That's
3 all I have.

4 MR. MOTLEY: I'm afraid to jump up,
5 Your Honor, for exercising Mr. Wagner. He
6 causes me great consternation.

7 THE COURT: The request essentially
8 is for the Court on paragraph 29 of my order
9 in limine regarding the FECA claim. Motion
10 in limine was granted. The request is that
11 that be lifted and also for a limiting
12 instruction.

13 I don't think the cross-examination
14 today has opened that area, so I'm going to
15 decline your request, Mr. Motley, and the
16 original motion in limine order will stand.
17 I may, however, take another look at that if
18 and when I think it deserves that. Thank
19 you, Counsel. See you at 1:15.

20 (Lunch recess was taken.)

21 MR. CASSELL: All rise.

22 (Jury present)

23 THE COURT: Be seated. All right.
24 Jury appears in its entirety, together with

1 The witness here, Counselor?
2 MR. CROSS: Yes, Your Honor, she
3 is.
4 THE COURT: Just have a seat,
5 ma'am. Would you tell us your name again.
6 THE WITNESS: Beth Kreider.
7 THE COURT: Ma'am, you recognize
8 you are still under oath?
9 THE WITNESS: Yes, sir.
10 THE COURT: All right.
11 MR. CROSS: Thank you, Judge.

12 BY MR. CROSS:

13 Q Mrs. Kreider, just before we broke for the
14 noon recess, we were about to go into the
15 subject of the nature of your work in the
16 supply department at the VA Hospital. Just
17 to reorient you to that subject, and the
18 Court as well, you were in supply from
19 approximately 1978 to 1990, give or take?

20 A Something like that, yes.

21 Q And once again, how many of those years were
22 you the supervisor?

23 A Probably nine or ten.

24 Q Now, if you would, please, could you
25 describe for the jury what involvement you

1 would have in the capacity of a clerk and
2 then as a supervisor in the supply
3 department with regard to cigarettes.

4 A As a supervisor, nothing, because cigarettes
5 were gone from the department before I
6 became supervisor. When I went into supply,
7 and I can't tell you why or how they got
8 there, but the VA had a program for indigent
9 patients where they furnished personal care
10 items and things for the indigent patients
11 who did not have funds to buy their own, and
12 somehow those were assigned to our
13 department, and along with their supplies,
14 like the electric raisers, toothpaste,
15 things like this that they didn't have funds
16 to buy, there were cigarettes given to those
17 patients as well, and those were assigned to
18 medical supply.

19 They did not come out of our medical
20 supply funds, but we were responsible for
21 dispensing those to the indigent patients.

22 Q And did you, when you say dispensing, what
23 exactly would be your involvement in the
24 distribution of cigarettes?

25 A There was a hospital, what we called a G and

1 L sheet, gain and loss sheet, that came out
2 on a daily basis, telling us how many
3 patients were on the unit, how many they had
4 gained, how many they had lost, how many of
5 those were indigents, how many were service
6 connected and things like that.

7 And we took an average for the month
8 for the number of indigent patients that
9 were assigned to a ward and dispensed so
10 many packs or cartons of cigarettes to each
11 unit depending on the number of indigent
12 patients they had for the month.

13 Q So was there a central warehouse or some
14 building on the complex where cigarettes
15 were stored during this time?

16 A Yes. The VA had a supply warehouse where
17 supplies were stocked for all the
18 departments of the hospital. That was
19 another section of supply service. And the
20 cigarettes were stocked there, both for us
21 to issue to the indigent patients and for
22 the canteen to sell in the canteen.

23 Q Okay. And what do you know about the sales
24 of cigarettes from the canteen?

25 A In the early years that I was there,

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1 cigarettes were much cheaper for the
2 patients to buy at the canteen than they
3 were to buy off of the hospital grounds.
4 Later on, they came, you know, through with
5 some law or policy, they came up with a
6 price that they would make the price similar
7 to what was in the community. Anyone that
8 had funds of their own could go to the
9 canteen and buy cigarettes. The
10 cigarette -- the canteen was open to both
11 staff and patients.

12 Q And did staff members buy cigarettes there?

13 A Yes.

14 Q Did you frequent the canteen while you
15 worked there?

16 A Yes.

17 Q And did you have occasion to observe people
18 buying cigarettes there?

19 A Yes.

20 Q What about patients who were unable to
21 physically go to the canteen themselves, but
22 still had money?

23 A The canteen had a cart similar to what
24 general hospitals have, staffed by volunteer
25 service, where they took a cart with

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1 supplies, candy, cigarettes, gum,
2 toiletries, things on a cart to the units to
3 let them buy from that cart. The patients
4 who were not able to handle money, they
5 purchased what was called canteen coupon
6 books for them. If they -- you know, if it
7 was a patient who they thought might give
8 his money to someone or lose his money, they
9 had the canteen books. And the medical
10 clerks kept those books and then when the
11 cart came around, they were given the books
12 to buy their supplies with.

13 Q So drawing your attention to the time period
14 that you were involved in the distribution
15 of cigarettes from the supply department,

16 would you actually, you yourself, actually
17 physically handle cigarettes?
18 A Right. I took the cigarettes to the units
19 as a supply clerk.
20 Q And how often would you do this again?
21 A Usually we tried to do it once a month. But
22 if patients were moved during the month, we
23 might have to take them mid-month because
24 the patient might have been, come in from
25 outside or come from another building to a

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1 building and not have cigarettes, so we
2 tried to do it on a monthly basis, but
3 sometimes that didn't work out.

4 Q Now, drawing on your observations, your
5 personal observations of cigarettes being
6 smoked in the canteen -- I'm sorry, being
7 sold in the canteen, being smoked on the
8 wards, you, as a nurse's assistant, in
9 handing them out, and also your experience
10 in supply, in distributing them to the
11 various wards, did you have occasion to
12 observe the various brands that were being
13 sold and smoked in the Veteran's Hospital?

14 A Yes.

15 MR. OHLEMAYER: Objection, Your
16 Honor, foundation as to time.

17 THE COURT: Sustained.

18 Q During the entire time that you lived -- or
19 that you worked at the Veteran's
20 Administration Hospital, did you have
21 occasion to observe brands?

22 A Yes.

23 Q All right. And can you tell this jury what
24 some of the brands are that you remember
25 during the time period that you worked at

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1 the VA Hospital?

2 A There were Winstons, Marlboros, Lark.

3 MR. OHLEMAYER: I'm sorry to
4 interrupt, Your Honor. I think we still
5 need some time specificity. The witness, I
6 think, post-dates and predates the relevant
7 time period.

8 THE COURT: I realize it might be
9 difficult for her to distinguish particular
10 years she worked there, so I think I'll
11 allow the question, Counselor.

12 A You know, I'm sure that I can't name them
13 all. I think when I had time without people
14 sitting around and looking at me, I might
15 have been able -- I think I gave in the
16 deposition that I did, I gave them a list of
17 cigarettes that I remember. All these were
18 not sold at the canteen. I say this because
19 I specifically remember one patient who
20 smoked Winstons, and Winstons were not sold
21 at the canteen. So he would ask different
22 employees, visitors, anyone that he could,
23 to bring Winstons in for him because he
24 preferred that brand over others, and

25 Winston was not sold in the canteen.

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1 MR. CROSS: May I approach the
2 bailiff, Your Honor?

3 THE COURT: Go ahead.

4 Q Mrs. Brewer, I'll hand you a document that's
5 been marked for purposes of identification
6 only.

7 MR. OHLEMAYER: Excuse me, Your
8 Honor.

9 Q Exhibit 24. Plaintiffs' Exhibit 24. Have
10 you seen this document before?

11 A Yes.

12 Q Does this contain a list of the cigarettes
13 that you might have sat down and compiled at
14 a time when people weren't looking at you?

15 A Right.

16 Q All right. Would you take a moment and
17 refresh your memory as to some of the brands
18 that you previously identified.

19 A Malibu, Pall Mall, Kent, Newport, Doral,
20 Kool, Marlboro, Camels, Lucky Strikes, Old
21 Gold, True, Chesterfield, Salems, Vantage,
22 Winston, Eve, L & M, Larks, Benson and
23 Hedges, Cambridge, Merits, Parliament,
24 Philip Morris, Players, Virginia Slims and
25 Bell Air.

KREIDER-DIRECT

2549

1 Q And as you sit here today, Mrs. Kreider, are
2 you of the opinion that each and every one
3 of those brands was sold or smoked at the VA
4 Hospital during the time of your employment?

5 A Probably these and others that I don't
6 remember.

7 MR. CROSS: Pass the witness, Your
8 Honor.

9 THE COURT: I'm not sure she
10 answered your last question. His question
11 was were all those brands sold at the
12 hospital.

13 A He said -- I understood him to say sold or
14 smoked.

15 THE COURT: What was your question?

16 MR. CROSS: Greg, sold or smoked.

17 I'm sorry, sold or smoked.

18 THE WITNESS: Yes.

19 THE COURT: All right. Thank you.

20 Mr. Wagner?

21 MR. WAGNER: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. WAGNER:

24 Q Mrs. Kreider, you and I met before at your
25 deposition?

KREIDER-CROSS

2550

1 A Yes.

2 Q You have a husband and you're recently
3 married; is that right?

4 A Correct.

5 Q And he's a smoker?

6 A Well, he was.

7 Q Did he quit?
8 A He's trying.
9 Q He's trying but he still smokes.
10 A Very little, and he doesn't smoke in the
11 house anymore. He's -- but that's a
12 personal matter with him.
13 Q Let me ask you a couple of questions, first
14 of all, about the VA Hospital itself where
15 you worked for a number of years, okay? The
16 buildings, how it's laid out and all that,
17 kind of bear with me here for a minute.

18 And we asked you some of these
19 questions at your deposition. There were --
20 you worked in about 13 or 14 disconnected
21 buildings; is that right?

22 A Probably at least that many, yes, that
23 housed patients.

24 Q 13 or 14 disconnected buildings that housed
25 patients; right?

KREIDER-CROSS

2551

1 A Right.

2 Q And there were also buildings that did not
3 house patients; right?

4 A Right.

5 Q There was a canteen building that didn't
6 house patients?

7 A Right.

8 Q There were supply offices that did not house
9 patients; right?

10 A Right.

11 Q There was a warehouse that did not house
12 patients; right?

13 A Right.

14 Q There was a gym and a bowling alley that
15 didn't house patients?

16 A Right.

17 Q Administrative offices that did not house
18 patients?

19 A Right.

20 Q Recreation, voluntary service, chaplain
21 services, all those buildings did not house
22 patients; right?

23 A Those departments didn't house patients.

24 Now, some of those departments might have
25 had offices on patient units.

KREIDER-CROSS

2552

1 Q Okay. Some of the buildings in that
2 Veteran's Administration complex were
3 buildings you'd go to for committee
4 meetings; right?

5 A Right.

6 Q And so if you were, for example, a member of
7 a particular committee, you might go, for
8 example, to the administration building for
9 a committee meeting; right?

10 A Yes.

11 Q And there was also an education building?

12 A Yes.

13 Q Where a lot of the meetings and seminars
14 were held?

15 A Yes.

16 Q And there was also a patient and employee's
17 library; isn't that right?
18 A Right. There were in two separate
19 buildings, separate libraries.
20 Q There was a patient library?
21 A And staff library.
22 Q And staff library. They were separate.
23 A Right.
24 Q And while you were worked there, a major
25 remodeling of Building 16 took place, didn't
KREIDER-CROSS

2553

1 it?
2 A Major remodeling of a lot of the buildings
3 took place, but 16 was included, yes.
4 Q 16 was included, wasn't it? And in that
5 major remodeling, walls and panels were put
6 in?
7 A Yes.
8 Q And they put in what you call a three-way
9 air system; right?
10 A Right.
11 Q And at that time, they moved the patients
12 and staff to another area?
13 A Correct.
14 Q And they revamped both the first and second
15 floors?
16 A Yes.
17 Q And then there came a time when there were
18 no patients on the third floor in Building
19 16; right?
20 A Right.
21 Q And in addition to that major renovation,
22 there were minor renovations in Building 16
23 from time to time; right?
24 A Right.
25 Q Where they removed, changed ceiling tiles?

KREIDER-CROSS

2554

1 A Yes.
2 Q And lowered the ceilings or put in new
3 showers, that sort of thing?
4 A Correct.
5 Q And in connection with that major
6 remodeling, they piped in oxygen air and a
7 suction system in the patients' rooms;
8 right?
9 A Right.
10 Q So if a patient needed oxygen in his room,
11 you could tap into that oxygen supply;
12 right?
13 A Yes.
14 Q You have to answer -- did you answer out
15 loud?
16 A Yes.
17 Q Okay, thank you. And you recall actually
18 that there was asbestos that was used in the
19 Veteran's Administration Hospital; right?
20 A Well, I don't recall the asbestos being put
21 in but there were asbestos removal projects
22 where the areas were partitioned off and
23 blocked off for asbestos removal.
24 Q Okay.

25 A The asbestos was probably put in long before
KREIDER-CROSS

2555

1 my time.

2 Q Okay. I want to talk about your work there
3 at the Veteran's Administration Hospital
4 too, Mrs. Kreider. You began in 1976 at the
5 Veteran's Administration Hospital; right?

6 A Yes.

7 Q So that would have been three years after
8 Mildred Wiley began working, if she started
9 working in 1976.

10 A If she started working then. I didn't know
11 when she started working, though.

12 Q Well, the jury has heard she started working
13 in '73, so that would have been three years
14 after she started working. And you didn't,
15 as I understand of course, work the entire
16 18 years or so that you worked for the
17 Veteran's Administration as a nursing
18 assistant.

19 A No.

20 Q You worked in medical supply. And when you
21 first started in 1976 at the Veteran's
22 Administration Hospital, you actually worked
23 in Building 138, didn't you?

24 A Right.

25 Q And that was a long-term geriatric care-type
KREIDER-CROSS

2556

1 unit?

2 A Yes.

3 Q And then after that you worked in other
4 buildings from time to time.

5 A Yes.

6 Q And you actually don't have any recollection
7 of working in Building 16 until about 1980
8 when you began working in medical supply;
9 isn't that right?

10 A Right. If I worked on Building 16 before I
11 went into medical supply, it was just for a
12 shift occasionally to pull relief when I was
13 reassigned.

14 Q Okay. But the point is that when you --
15 your first recollection of being in Building
16, being around 1980, that was -- assuming
17 Mrs. Wiley started working in 1973, that
18 would have been seven years after she
19 started working.

20 A Right.

21 Q And when you worked as a nursing assistant,
22 you worked days for a period of time, and
23 then you'd work nights and evenings; right?

24 A Right.

25 Q And you rotated on all those shifts from
KREIDER-CROSS

2557

1 1976 to 1980 while you were a nursing
2 assistant; right?

3 A Right.

4 Q And that's because that's what all the staff
5 nurses and the nursing assistants had to do;
6 right?

7 A No. Yes and no. The nursing assistants who
8 were permanently assigned to second or third
9 shift only came on day shift for seminars
10 and training classes that were held on days.
11 But if you worked days, you rotated to all
12 shifts.

13 Q Well, it's fair --

14 A Did I clarify that at all?

15 Q Well, probably.

16 A Most -- some people did not rotate. If they
17 were permanently assigned to a second- or
18 third-shift position, but it didn't matter
19 if you had been there for 20 years, if you
20 were assigned to day shift, you did rotate
21 to pull relief on other shifts.

22 Q You and I can agree that generally speaking,
23 most of the nurses, most of the nursing
24 assistants rotated day, evening, night?

25 A Well, it would be approximately a third,
KREIDER-CROSS

2558

1 because it would be the day shift rotated,
2 but the other shifts didn't routinely.

3 Q Now then, in 1980, you began, or about 1980,
4 I think you were not quite sure of the exact
5 date when you started in medical supply --
6 was it 1980?

7 A I don't really remember the dates.

8 Q Okay. And whatever that date was, and I
9 think you told us in your deposition you
10 thought it was 1980. Would that be pretty
11 close?

12 A That's reasonably close to the time.

13 Q And you worked then in medical supply from
14 1980 until about 1989 or 1990; something in
15 that area?

16 A Right.

17 Q Is that right?

18 A Right.

19 Q And you became a supervisor of the medical
20 supply department then in about, let's say,
21 1981 or so; right?

22 A Right.

23 Q And the medical supply building -- excuse
24 me, the medical supply department was not in
25 Building 16, was it?

KREIDER-CROSS

2559

1 A Not at that time, no.

2 Q It was in the basement of Building 138?

3 A Right.

4 Q And during the entire time that you worked
5 in the medical supply department, you worked
6 days and you had weekends and holidays --

7 A Right. Off.

8 Q -- off. That's right. And up to the time
9 that Mrs. Wiley became the head nurse, since
10 she was a staff nurse, she would have
11 rotated on all these other shifts we're
12 talking about, days, evenings, and nights;
13 right?

14 A Yes.

15 Q And when you transferred then to Building 16

16 as a nurse's assistant, which was about,
17 what, 1989, 1990?
18 A Right.
19 Q At that time Mrs. Wiley was the head nurse.
20 A She either was the head nurse or became the
21 head nurse around that time. I don't know
22 if she was head nurse when I went or
23 assigned shortly after.
24 Q Well, we heard --
25 A She was on that building at that time.

KREIDER-CROSS

2560

1 Q I think we've all heard a lot of evidence
2 before you got here that she became the head
3 nurse about 1985. And so when you went back
4 to Building 16 as a nursing assistant,
5 Mrs. Wiley, as a head nurse, worked days;
6 right?
7 A Primarily, yes.
8 Q And you worked the second shift during that
9 period of time; right?
10 A Not all the time, but as much as I could I
11 did. I was not assigned to second shift,
12 but I pulled as much of the relief and
13 staffing on that shift as I could.
14 Q All right. But Mrs. Wiley, then, during
15 that period of time that you were there in
16 Building 16, from about 1989 or 1990, up
17 until the time of 1991 when Mrs. Wiley fell
18 sick, you, for the most part, did not work
19 days but she did work days; right?
20 A Right.
21 Q All right. Mrs. Wiley, as a staff nurse,
22 would have been a member of committees and
23 study groups; right?
24 A As a staff nurse and as a head nurse both.
25 Q But as a staff nurse, she would have been a

KREIDER-CROSS

2561

1 member of committees?
2 A Sure.
3 Q Sure. And committee meetings, the kind
4 we're talking about here, were held in the
5 administration building?
6 A It depended on how big or how small the
7 group was and what the committee was.
8 Sometimes they were held right on the
9 nursing units.
10 Q Some of them were held in the administration
11 building, though; isn't that right?
12 A Right.
13 Q Some of them were held in the education
14 building?
15 A Yes.
16 Q And some of them were held in a building
17 across the street from the hospital called
18 the Credit Union Building?
19 A Right.
20 Q And some of these meetings and seminars --
21 strike that.
22 Some of the educational meetings that
23 nurses went to were actually in places
24 outside of Marion, Indiana; right?

25 A I'm sure they probably were for nurses,
KREIDER-CROSS

2562

1 because some of mine were as, in supply, so,
2 you know, I didn't keep up with where they
3 went, but there were seminars that we got
4 bulletins on that were not on the hospital
5 grounds that they could apply to go to.

6 Q Some of the places that the nurses would go
7 to for seminars included the Veteran's
8 Administration Regional Training Center in
9 St. Louis?

10 A Right.

11 Q And in Indianapolis?

12 A Yeah. I imagine.

13 Q Fort Wayne?

14 A Might have been a few at Fort Wayne. Fort
15 Wayne was not that big of a facility that
16 they had that many.

17 Q But they did go there from time to time?

18 A It's possible, yeah.

19 Q Now, in answer to Mr. Cross' questions about
20 your work in the medical supply department
21 beginning about 1980, you testified, I
22 believe, that that department stocked
23 cigarettes that were given to indigent
24 patients; is that right?

25 A Right.

KREIDER-CROSS

2563

1 Q But isn't it a fact that a few months after
2 you began working in the medical supply
3 department, it stopped distributing
4 cigarettes?

5 A It stopped sometime shortly after I started,
6 yes, because we had a supervisor who did not
7 think it was appropriate.

8 Q Okay. And a few months then after you began
9 working there would have been a few months
10 after you started working there in about
11 1980. So we can agree that in about 1980,
12 then, that the medical supply department
13 stopped distributing cigarettes; right?

14 A Right.

15 Q And you mentioned your knowledge about
16 cigarettes being sold in the canteen; you
17 remember that?

18 A Yes.

19 Q And were there cigars sold in the canteen?

20 A Yes.

21 Q Pipe tobacco was sold in the canteen?

22 A Yes.

23 Q Pardon me?

24 A As far as I remember, it was. I didn't use
25 it, so I didn't buy it.

KREIDER-CROSS

2564

1 Q Okay. Let me switch over to another
2 subject. You told Mr. Cross something about
3 the condition of the patients in Building
4 16. Let me just go back over that for a
5 moment.

6 You would describe those patients,

7 would you not, as long-term care patients?
8 A Yes.
9 Q And they needed assistance for most of their
10 daily needs?
11 A The majority of the patients did, yes.
12 Q Some were confined to their beds?
13 A Yes.
14 Q And some of them required feeding bags?
15 A Yes.
16 Q Some of them required restraints?
17 A Yes.
18 Q Some of them required catheters?
19 A Yes.
20 Q Some of them had to have diapers?
21 A Yes.
22 Q And many of them required oxygen that was
23 piped into their units?
24 A Not a great deal of them required oxygen on
25 a daily basis. It was just there for the

KREIDER-CROSS

2565

1 convenience of being able to give it to them
2 without transferring them to medical if they
3 developed pneumonia or something that caused
4 them to need it for a while.
5 Q But some of the patients required oxygen;
6 right?
7 A On occasion.
8 Q And not all those patients smoked, did they?
9 A Probably not.
10 Q And of those patients that smoked, they
11 could only smoke during certain times; isn't
12 that right?
13 A Now, are we talking about the last couple
14 years when I worked in nursing on that unit
15 or are we talking about the entire time?
16 Q Well, I'm talking about your testimony about
17 what you remember you saw during --
18 A When I was working in medical supply
19 delivering supplies to the unit, the
20 patients were allowed to smoke on the
21 building. And the majority of them probably
22 did smoke.
23 Q Okay. I understand that. My question is,
24 that there were times when those patients
25 could not smoke; isn't that right?

KREIDER-CROSS

2566

1 A Yeah. If they were in bed, they couldn't
2 smoke in the rooms.
3 Q Well, do you remember telling us about that
4 in your deposition? That there were times,
5 apparently, when the patients could not
6 smoke?
7 A Yes.
8 Q Okay. And I think you told us that in the
9 later years that you remember in Building 16
10 about two-thirds of the patients on that
11 floor, on the first floor, were bedfast with
12 tubes. Remember that?
13 A Yes.
14 Q And smoking was not allowed in the patients'
15 rooms; correct?

16 A No. But when I talk about a bedfast
17 patient, I'm talking about a patient who is
18 non-ambulatory and cannot get out of bed on
19 his own. He may be got out of bed and taken
20 to other places in the hospital. It doesn't
21 mean -- when I talk about a bedfast patient,
22 in my work, I'm not talking about somebody
23 that never gets out of their bed.
24 Q Sure, I understand that.
25 A Okay.

KREIDER-CROSS

2567

1 Q And while you were still working in medical
2 supply during those years, smoke eaters were
3 installed at most of the buildings at the
4 Veteran's Administration Hospital; isn't
5 that correct?
6 A Yes.
7 Q And that was a big apparatus that would suck
8 the smoke up?
9 A It was supposed to. If they were large
10 enough for the area, they would work. If
11 they weren't large enough, they didn't --
12 weren't too successful sometimes.
13 Q Well, in fact, you recall, do you not, that
14 in Building 16 those smoke eaters were
15 installed in the first floor day room?
16 A Yes.
17 Q Smoke eater was installed in the second
18 floor day room in Building 16 also; isn't
19 that right?
20 A Yes.
21 Q And you recall that there was a no-smoking
22 policy instituted in the 1980s sometime;
23 correct?
24 A Sometime in the late '80s yes.
25 Q In connection with that no-smoking policy,

KREIDER-CROSS

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1 no-smoking signs were posted in the canteen?
2 A Yes.
3 Q And no-smoking signs were posted in some
4 other places in Building 16; right?
5 A Right.
6 Q And, in fact, you remember because your
7 husband tried to get the no-smoking policy
8 in the canteen lifted; right?
9 A That's right. Through his veteran's
10 organization.
11 Q And each building there were areas where
12 staff employees and visitors could no longer
13 smoke; correct?
14 A Correct.
15 Q And you remember when Mildred Wiley had an
16 office?
17 A Yes.
18 Q She had an office when she was head nurse?
19 A Yes.
20 Q And Mildred Wiley did not allow smoking in
21 her office, did she?
22 A No.
23 Q In fact, there were no ashtrays in her
24 office, were there?

25 A No.

KREIDER-CROSS

2569

1 Q You don't recall ever hearing Mildred Wiley
2 saying she wanted to transfer to a different
3 part of the hospital from Building 16; isn't
4 that correct?

5 A I don't remember her ever discussing that.

6 Q And you don't have any recollection that
7 Mrs. Wiley ever complained about smoking in
8 the Veteran's Administration Hospital, do
9 you?

10 A Mrs. Wiley didn't do a lot of complaining.
11 So I don't remember her --

12 Q But you don't have any recollection that
13 she --

14 MR. MOTLEY: Excuse me, Your Honor.
15 He's talking over the witness.

16 MR. WAGNER: Mr. Motley is correct.

17 THE COURT: Did you finish your
18 answer, ma'am?

19 A Yes. I don't remember her complaining about
20 anything.

21 Q In fact, you also never complained about the
22 smoke; isn't that correct?

23 A I probably complained about anything I could
24 complain about.

25 Q Remember telling us in your deposition you

KREIDER-CROSS

2570

1 never complained about the smoke?

2 A Not specifically, I didn't complain about
3 it.

4 Q And you testified about having to help the
5 patients smoke every once in a while; is
6 that right?

7 A That was part of our job.

8 Q That was part of your job there. And since
9 you were not a smoker, didn't Mrs. Wiley
10 give you the opportunity to avoid helping
11 the patients smoke?

12 A Yes. She told me if it didn't upset me and
13 bother me, you know, she wouldn't assign
14 that to me any more than necessary to cover
15 herself with the unit. That she would
16 assign that to other people who were
17 smokers.

18 Q She told you that she would assign that duty
19 to other people who were smokers because the
20 smokers liked to help the patients smoke so
21 they could smoke; right?

22 A Sure.

23 Q I want to talk to you about your testimony
24 about the brands of cigarettes that you
25 remember being sold or used at the Veteran's

KREIDER-CROSS

2571

1 Administration Hospital; okay? Just want to
2 go back through that a little bit.

3 A Okay.

4 Q You with me?

5 A (Affirmative nod)

6 Q All right. That subject came up in 1997

7 when you talked to Mr. Max Howard and
8 Mr. Cross at lunch one day; right?
9 A It came up that day, but it had also been
10 discussed back in May of '93, when
11 Mr. Howard had talked to me at the hospital.
12 Q Well, let's go back to that then for a
13 minute. In 1993, Mr. Howard came out to the
14 Veteran's Administration Hospital, and he
15 and some other attorneys began interviewing
16 people there at the hospital; right?
17 A Right.
18 Q And you were one of those people that got
19 interviewed.
20 A Right.
21 Q And then you didn't talk to Mr. Howard about
22 that subject again from 1993 until 1997;
23 right?
24 A No.
25 Q No, that's not correct?

KREIDER-CROSS

2572

1 A No, I did not.
2 Q No, you did not, all right. And then you
3 met Mr. Howard and Mr. Cross for lunch in
4 October of 1997.
5 A Right.
6 Q Was Mr. Motley there with you at that time?
7 A No.
8 Q Do you know who Mr. Motley is?
9 A No.
10 Q And then at that lunch, Mr. Howard read to
11 you a list of cigarette brand names, didn't
12 he?
13 A He showed me notes that he had taken from
14 our previous meeting that had a list on it
15 that I had given him.
16 Q Well, actually he never showed you the list,
17 did he? He just read it to you.
18 A He read it to me.
19 Q But you didn't see the list.
20 A That he had?
21 Q Yes, ma'am.
22 A No.
23 Q All right. Now, in this affidavit -- in
24 this paper that you brought here today, and
25 your testimony here before the jury that

KREIDER-CROSS

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1 you've related the brand names, I was
2 counting those up and there were 26 of
3 those. Right?
4 A I never counted them.
5 Q Well, I just counted them. And there are a
6 list of 26 different brand names; right?
7 And that's pretty good memory feed, isn't
8 it?
9 A Well, probably what I did was named the
10 cigarette brands that I was familiar with
11 and that I had seen people smoking, because
12 that's the only place where I was usually
13 around very much smoke, except for what my
14 husband smoked at home, and he smoked
15 Vantage.

16 Q It's correct, isn't it, Mrs. Kreider, that
17 you have no recollection of a specific
18 incident when each of the brands you've
19 identified were smoked in Building 16;
20 correct?
21 A Correct.
22 Q And you have no recollection of specific
23 patients smoking specific brands in Building
24 16, do you?
25 A Some patients I could probably name specific
KREIDER-CROSS

2574

1 brands they smoked, but I think I told you
2 in the deposition that that's not something
3 I paid attention to, because the girl that I
4 regularly worked with, I don't even know
5 what brand she smoked. I was with her on a
6 daily basis.
7 Q But you remember telling us in your
8 deposition that you had no recollection of
9 specific patients smoking specific brands in
10 Building 16. Right?
11 A I remember telling you that I don't remember
12 seeing patients smoke specific brands in the
13 presence of Millie, but, you know, I may
14 have said Building 16.
15 Q Okay. And you don't have any recollection
16 of the brands smoked by staff members in
17 Building 16 either, do you?
18 A Not specific people and specific brands, no.
19 Q And you don't know what brand of cigarettes
20 all the visitors that came to the hospital
21 smoked, do you?
22 A No. But if visitors came in and smoked
23 them, the patients probably smoked them
24 because they would ask visitors for
25 cigarettes.

KREIDER-CROSS

2575

1 Q And when Mr. Howard and Mr. Cross contacted
2 you in October 1997 and talked to you about
3 this list of 26 brands of cigarettes, that
4 was about three years after you had retired
5 from the Veteran's Administration, wasn't
6 it?
7 A It's three years after I left. I did not
8 retire. I resigned.
9 Q All right. It was about three years after
10 you had left the Veteran's Administration
11 Hospital.
12 A Right.
13 Q And if the record in this case shows that
14 this lawsuit was filed in 1993, it would
15 have been over four years after this lawsuit
16 was filed; right?
17 A Yes.
18 MR. WAGNER: I think that's all I
19 have, Your Honor.
20 THE COURT: Mr. Ohlemeyer.
21 MR. OHLEMAYER: Just a couple.
22 CROSS EXAMINATION
23 BY MR. OHLEMAYER:
24 Q Mrs. Kreider, my name is Bill Ohlemeyer. I

25 just have a few questions for you.

KREIDER-CROSS

2576

1 You told Mr. Cross before lunch about a
2 patient that you apparently had told
3 Mr. Cross about before this morning.
4 Remember that discussion?

5 A Yes.

6 Q And you told us about -- the way that
7 patient smoked cigarettes.

8 A Yes.

9 Q I'm correct, though, that you don't know if
10 Mrs. Wiley ever had to have that same
11 experience with that patient or had to deal
12 with that patient?

13 A I couldn't say yes, she did, but I couldn't
14 say no, she didn't, because part of the
15 nurse's job also was helping the patients to
16 smoke, the same as the aides were.

17 Q But am I correct that page 19, Counselor,
18 you were asked this question, you gave this
19 answer at your deposition, in connection
20 with a discussion of that patient:

21 "Question: Do you know if Mildred
22 Wiley ever had this same experience with the
23 patient?

24 "Answer: No, I don't."

25 A No. I only can be responsible for what I
KREIDER-CROSS

2577

1 do. I don't keep track of what everybody
2 else does.

3 Q I understand. Your husband used to be a
4 regular smoker?

5 A My present husband, yes.

6 Q Present husband. He would smoke in your
7 house?

8 A Yes.

9 Q In the car?

10 A Yes.

11 Q There would be times where you would be
12 spending time with him and he would be
13 smoking in your presence?

14 A Yes.

15 Q Do you know how many cigarettes he would
16 have to smoke before your hair or your
17 clothes would smell like cigarettes, ma'am?

18 A No. I don't really know.

19 Q More than one?

20 A Well, probably more than one at our house
21 because I have Hepa air filters going all
22 the time, so that helps take that out of my
23 house.

24 Q How about in the car?

25 A We usually have the vents open and the air

KREIDER-CROSS

2578

1 on, even in the winter.

2 Q Mrs. Wiley was the kind of person that would
3 let you know if she was unhappy about
4 something you were doing at work; isn't that
5 right?

6 A If it was job-related, yes.

7 MR. OHLEMAYER: That's all I have.
8 Thank you.
9 THE COURT: Redirect, Mr. Cross?
10 MR. CROSS: Yes, Your Honor. Thank
11 you.

12 DIRECT EXAMINATION
13 BY MR. CROSS:

14 Q Mr. Wagner asked you a number of questions
15 about committee meetings and education
16 building and administration building and so
17 on. When you saw Mildred Wiley during the
18 time, during those long years you worked in
19 supply, where would you see her at?
20 A Most of the time that I saw her would be on
21 the building, on Building 16, because it
22 would be when I was talking with her about
23 supplies, in general, or about evaluations
24 going on with supplies that were being done
25 on that building or something.

KREIDER-REDIRECT

2579

1 Q And can you, just so that we're clear on
2 this, could you tell the jury again
3 approximately how many times you would --
4 you believe that you would have encountered
5 her in Building 16 during those years each
6 week?

7 MR. WAGNER: Asked and answered.
8 MR. CROSS: I'm entitled to
9 clarify.

10 A THE COURT: You can tell us.
11 A Sometimes I might be on that building four
12 or five times in one day, but I was always
13 on it maybe eight or ten times in a week.
14 And if -- since she was normally a day
15 nurse, I would probably see her when I was
16 there. Whether I was specifically meeting
17 with her or not, you know, I possibly would
18 see her.

19 Q Do you recall about how often you might have
20 gone to Building 16 for some reason or
21 another and not seen her there on the floor?

22 A No. Because it would vary as to whether she
23 was working A or B floor, which was first
24 and second floor. Or, you know, whether I
25 was -- probably I would see her because even

KREIDER-REDIRECT

2580

1 if she was in her office, you walked by her
2 office to get to the nurse's station.

3 Q Now, Mr. Wagner asked you a question about
4 there being asbestos at the Veteran's
5 Administration Hospital and the occasions
6 when it might have been removed. You don't
7 ever recall any asbestos removal taking
8 place in regards to Building 16, do you?

9 A No, not specifically.

10 Q And those -- and those few instances when
11 you did happen to see that in one of the
12 other buildings -- could you describe what
13 measures were taken by the people that were
14 doing that work?

15 A Well, I also sat, as supervisor of central

16 supply, I sat on the infection control
17 committee, and the safety committee, and it
18 was always petitioned off. And even the
19 door, if it was coming off of a corridor
20 where there was a closed door, they would
21 always build maybe a foot or two out from
22 that door. Leaving enough room for the door
23 to open, but they would build out with
24 plastic and wood framing to partition it off
25 so that they would go into that little

KREIDER-REDIRECT

2581

1 enclosed area before they opened the door
2 into the big area where they were doing
3 removal, and that was just standard
4 procedure, wherever there was asbestos
5 removal going on. They would partition it
6 off and it was a restricted area and no one
7 was allowed in it except the workers that
8 were involved.

9 Q Would you have ever seen a cloud of asbestos
10 then come up from the place where that work
11 was being performed?

12 A No.

13 Q There were clouds of smoke in the building,
14 were there not?

15 A Yes.

16 Q Now, you testified that the supervisor who
17 was one of your predecessors in the supply
18 department thought it wasn't appropriate
19 that cigarettes be distributed out of the
20 medical supplies department; was that your
21 testimony?

22 A Right. Well, he didn't think any of the
23 indigent supplies should be kept there
24 because they weren't medical supply items.

25 Q But prior to that time, cigarettes had been

KREIDER-REDIRECT

2582

1 treated just the same as if they were
2 medical supplies?

3 A Except that they were not bought out of our
4 budget. They weren't funded from our
5 medical supply budget, but they were stored
6 and stocked in that department, yes.

7 Q And how did it come about that cigarettes
8 were distributed -- strike that.

9 After that change was made, were
10 cigarettes still stored in those warehouses
11 you talked about?

12 A Cigarettes were still stored in the
13 warehouse and sold at the canteen, yes.
14 Whether free cigarettes stopped at that
15 time, the indigents' cigarettes stopped at
16 that time or were assigned to another area
17 of the hospital, I really don't remember.

18 Q But after that change in the way they were
19 processed through the system at the
20 Veteran's Administration Hospital, did you
21 notice that the level of smoke present in
22 the buildings declined at all?

23 A No. Not that I recall.

24 Q Okay. Now, back to the cigars and the pipe

25 tobacco that was sold in the canteen. You
KREIDER-REDIRECT

2583

1 answered a question of Mr. Wagner's that you
2 did observe that that was going on?

3 A Yes.

4 Q Did you -- are you familiar with any brands
5 of pipe tobacco that were sold in the
6 canteen?

7 A No.

8 Q Have you ever seen the brand Sir Walter
9 Raleigh pipe tobacco?

10 MR. WAGNER: Objection, Your Honor,
11 leading, suggestive.

12 THE COURT: Sustained. She's
13 answered it.

14 Q You said that -- you answered some questions
15 in response to these gentlemen about the
16 measures that you take to ventilate your
17 home and when you let your husband smoke
18 there and in your automobile?

19 A I don't let my husband. He chooses to do
20 that.

21 Q Okay.

22 A I don't tell him what to do. I don't think
23 he's in here, but don't get me in trouble at
24 home.

25 Q You realize that this is -- this will be a
KREIDER-REDIRECT

2584

1 public record?

2 A Yeah. But I don't think anybody knows him
3 that's in here.

4 Q There's a couple of newspaper reporters back
5 there. You sure you want to --

6 A He doesn't read the paper.

7 Q You may dodge that one then.

8 You did say some things about that,
9 though. You mentioned your husband had had
10 a complaint about, some kind of complaint,
11 being able to smoke; he thought he had a
12 right to. I just want to make sure that
13 that is not your present husband; is that
14 correct?

15 A No. When we were talking about my husband
16 helping, fighting through the veteran's
17 organization, my former husband, who is
18 deceased, was president of an American
19 Legion post, and he was not even a smoker at
20 the time that he was doing that. He had
21 quit because he had chronic lung problems
22 himself, but he felt that since that was
23 those veterans' home, they had a right to,
24 when they went to the canteen, to have a cup
25 of coffee, they had a right to have a

KREIDER-REDIRECT

2585

1 cigarette if they wanted to. And through
2 the American Legion organization he helped
3 to try to get them as many rights as he
4 could, even though at that time he was not a
5 smoker himself.

6 Q So just to be -- along the same lines, we're

7 clear on another point, when these
8 restrictions on smoking were instituted in
9 the late 1980s, these pertained to employees
10 only, did they not?
11 A To begin with, yes. Later on, I think there
12 were probably restrictions placed on
13 patients' smoking in buildings, but to begin
14 with, it came down on the employees before
15 it did patients, yes.
16 Q When did the restrictions on patients
17 themselves go into --
18 A I really don't remember.
19 Q Was it -- do you have an idea as to when it
20 was relative to when you resigned?
21 A Well, there were some patient areas still in
22 the buildings where smoking was when I left
23 the VA in '94.
24 Q 1994?
25 A Right. The patients could still smoke?

KREIDER-REDIRECT

2586

1 Certain areas but not employees.
2 Q Now, you stated that you resigned instead of
3 retired?
4 A Right.
5 Q What is the difference?
6 A I basically quit, but I resigned due to
7 personal reasons that would affect my
8 retirement income in later years because of
9 being an older, in years, federal employee,
10 and I was under the civil service program,
11 yet I had also taught school and worked
12 under Social Security; and it would have
13 affected my retirement income had I remained
14 at the VA and retired under the program that
15 I was under.
16 Q So it had to do with -- it didn't have
17 anything to do with you getting mad at
18 anybody?
19 A No.
20 Q Or leaving?
21 A It was financial reasons for my future years
22 when I get old.
23 Q Okay. Now, Mr. Wagner asked you some
24 questions about smoke eaters.
25 A Right.

KREIDER-REDIRECT

2587

1 Q And he talked to you a little bit about some
2 of your deposition testimony in that regard.
3 Did these smoke eaters make much noise?
4 A They were very noisy. The TVs would have to
5 be turned up for the patients who were
6 watching TV to be able to hear if the smoke
7 eaters were on.
8 Q And did this cause any problems in your
9 experience, the fact that they were noisy?
10 A Well, it caused gripey patients sometimes or
11 complaining staff, but --
12 Q Did the smoke eaters disperse all the smoke
13 that was generated in that building?
14 A No. No.
15 Q Did you notice whether or not the smoke

16 eaters did any good at all?
17 A They did remove some of the smoke, and
18 particularly, if you could encourage the
19 patients who were smoking to congregate in
20 the area of the smoke eater. But that
21 wasn't always possible because of the size
22 of the geri chairs and the chairs they were
23 sitting in. They couldn't all get real
24 close to it sometimes.
25 Q And there was only one on each floor?

KREIDER-REDIRECT

2588

1 A There was usually one smoke eater in a room,
2 yes.
3 Q Do you recall when those were instituted?
4 A No, I really don't.
5 Q Now, you stated in response to a series of
6 questions from Mr. Wagner that you could not
7 recall specific incidences where specific
8 patients would smoke specific brands, and I
9 just want to clarify that point because I
10 believe on direct examination, when I asked
11 you earlier, you mentioned --

12 MR. OHLEMAYER: Excuse me, Your
13 Honor. I object to this question as framed.

14 MR. CROSS: How do we know what it
15 is until I finish it?

16 MR. OHLEMAYER: Well, because you
17 can't repeat testimony as a predicate to a
18 question in a leading fashion.

19 THE COURT: I agree. Rephrase it,
20 Counselor.

21 Q Would you tell the jury again about the
22 indigent patient who wanted a particular
23 brand that was not purchased at the canteen?

24 MR. OHLEMAYER: Now, Your Honor,
25 based on the cross-examination, I object to

KREIDER-REDIRECT

2589

1 this lack of foundation, relevance, because
2 this witness didn't connect it to
3 Mrs. Wiley.

4 MR. CROSS: That wasn't the
5 question Mr. Wagner posed. He got her to
6 say that she couldn't recall any specific
7 instance of a specific cigarette being
8 smoked by a specific patient, and she
9 testified to the contrary. I could have
10 stood up and objected at that time.

11 THE COURT: I'm going to sustain
12 the objection.

13 Q Once again, let me ask you a very simple
14 question. What specific memories do you
15 have of particular brands being smoked by
16 particular patients during your tenure at
17 the VA?

18 MR. WAGNER: Your Honor, okay, this
19 was all gone into on direct examination.
20 She's already testified what her memory is
21 of this subject.

22 THE COURT: I think we've been over
23 that a couple times already.

24 MR. CROSS: All right, as long as

25 the record is clear.

KREIDER-REDIRECT

2590

1 Q This gentleman that we talked about on
2 direct examination, the paraplegic Vietnam
3 veteran, was he the kind of patient you
4 would refer to as a bedfast patient as you
5 discussed with Mr. Wagner?

6 A Yes.

7 Q Were there many people like him who were
8 either quadriplegic or unable to motivate or
9 move around on their own?

10 A Yes. Quite a -- maybe -- I don't know.
11 Maybe three out of 20 or something. Not a
12 great deal that were in that severe
13 condition that this particular patient was.
14 There were probably some that could not
15 motivate at all on their own.

16 Q And you personally assisted in the smoking
17 of this gentleman; correct?

18 A Yes.

19 Q Do you know whether or not -- you testified
20 in response to a question by Mr. Wagner you
21 didn't know whether Mildred Wiley ever
22 performed this function on this man.

23 A No.

24 Q Do you know whether Mildred Wiley was in the
25 building when you were performing this

KREIDER-REDIRECT

2591

1 function on this man?

2 A I couldn't say that she definitely was.

3 Q All right. And how many, during your
4 experience at the VA, how many times would
5 you have -- did you do this -- did you help
6 this man with this smoking every day in your
7 experience?

8 MR. WAGNER: Your Honor, seems to
9 me this is just repetitious stuff that we've
10 gone over.

11 THE COURT: I believe so.
12 Sustained.

13 Q Has it been difficult for your husband to
14 quit smoking?

15 MR. OHLEMAYER: Objection, Your
16 Honor. Relevance.

17 MR. WAGNER: Objection, Your Honor.
18 Irrelevant.

19 THE COURT: Sustained.

20 MR. CROSS: Pass the witness.

21 THE COURT: Mr. Wagner, anything
22 else?

23 MR. WAGNER: I have no further
24 questions.

25 THE COURT: Mr. Ohlemeyer?

KREIDER-REDIRECT

2592

1 MR. OHLEMAYER: I have nothing,
2 Your Honor.

3 THE COURT: Thank you, ma'am.
4 Call your next witness, Counsel.

5 MR. MOTLEY: Your Honor, we move to
6 introduce Exhibit 33608 at this time against

7 the members of the Tobacco Institute. May I
8 pass Your Honor up a copy?

9 MR. WAGNER: Your Honor, we're
10 going to need to be heard on this outside
11 the presence of the jury.

12 THE COURT: We have not dealt with
13 that issue yet?

14 MR. MOTLEY: No, sir, we haven't.
15 It's one I placed on the list earlier; he
16 raised a question I wanted to address.

17 THE COURT: How many are you going
18 to offer?

19 MR. MOTLEY: Just this one right
20 now.

21 THE COURT: Just that one? All
22 right. Ladies and gentlemen, we need about
23 five minutes. I'm sorry, but once in a
24 while it happens.

25 (Standard admonition).

KREIDER-REDIRECT

2593

1 (Jury not present)

2 MR. MOTLEY: May I approach and
3 hand Your Honor a copy of this?

4 THE COURT: Yes.

5 MR. MOTLEY: That has a yellow
6 sticker, I'm told, Your Honor. We premarked
7 it so as not to take up the Court's and
8 clerk's time in marking these things.

9 THE COURT: All right.

10 MR. WAGNER: Judge, I don't mean to
11 interrupt Mr. Motley, but we've already
12 argued this exhibit. It was offered before
13 and rejected by the Court.

14 MR. MOTLEY: I don't remember such
15 as that.

16 MR. OHLEMAYER: That's why it's not
17 marked.

18 MR. MOTLEY: We premarked all of
19 these, sir, to save time. I suggest you get
20 a different scribe than the one you've got
21 back there.

22 THE COURT: It was marked,
23 Counselor, but not argued.

24 MR. MOTLEY: You told us to revisit
25 this, Your Honor. I brought it up at

KREIDER-REDIRECT

2594

1 sidebar; you told us to revisit this
2 document.

3 This document goes to the issue of the
4 defendants' efforts to use the veteran's
5 organizations as stalking horses to keep
6 smoking going on in the Veteran's
7 Administration hospitals. And now that
8 Mr. Wagner has asked a specific question
9 about veteran's organizations, I wish to
10 offer it.

11 At the time you told me that it had
12 nothing to do, I believe, with the witness
13 that I was addressing. You never said I
14 couldn't bring this document back up again.

15 THE COURT: I have it.

16 MR. OHLEMAYER: Mr. Motley did
17 offer the exhibit.

18 MR. MOTLEY: Through a witness,
19 Your Honor.

20 THE COURT: Through Dr. Roggli.

21 MR. MOTLEY: Roggli, yes, Your
22 Honor. Now, they've raised the issue, Your
23 Honor, specifically to this witness about
24 veteran's organizations, and I would
25 respectfully ask Your Honor to look at --

KREIDER-REDIRECT

2595

1 these things don't have pages on them, or if
2 they have pages, you can't read them. So I
3 have to give you the Bates number, Your
4 Honor.

5 THE COURT: All right.

6 MR. MOTLEY: And I specifically
7 refer Your Honor to Bates Nos. 2731, 2732,
8 2736, 2737, and, Your Honor, that this --
9 essentially this is what I call the stalking
10 horse document, where the Tobacco Institute
11 was using veteran's organizations as a
12 stalking horse to keep smoking allowed in
13 Veteran's hospitals, and that's what this
14 document addresses.

15 And now that the defendants have raised
16 this as an issue in cross-examination, I
17 believe it's seasonable and fair for us to
18 move to introduce it at this time and
19 publish it to the jury. That's, in
20 essence -- that's, in fact, what it says,
21 Judge, and they objected to it at the time,
22 I believe, amongst other reasons, on
23 relevance and foundation. Now that they've
24 raised this, I don't -- this was produced in
25 files, Your Honor, of the Tobacco Institute

KREIDER-REDIRECT

2596

1 itself, it was an address by the chairman of
2 RJ Reynolds, and on the back it tells us who
3 all was there.

4 On page 38, the distribution is set
5 forth on page 38, distributed to the Tobacco
6 Institute, to Covington & Burling who
7 represents the Tobacco Institute, Chadbourne
8 & Parke, who represents American Tobacco
9 Company, to Philip Morris, to RJ Reynolds.
10 Remember Mr. Sheffler, he's -- and Shook
11 Hardy & Bacon, that's Mr. Ohlemeyer's law
12 firm.

13 And then further, Your Honor, at the
14 bottom there's some blind copies on page 39.
15 I can describe who those people are if you'd
16 like. I don't know how they can ask
17 questions of these witnesses about what
18 veteran's groups did, Your Honor, and not
19 make these things relevant in our case in
20 chief.

21 THE COURT: All right. The
22 document is reoffered. Defendants care to
23 be heard?

24 MR. WAGNER: I do, Your Honor. We

seem to be really stretching for reasons to
KREIDER-REDIRECT

2597

1 get some documents in. The question, as
2 Your Honor heard, is probably going to try
3 your patience repeating it, but
4 substantively this witness remembered that
5 there was a time when the canteen at the
6 hospital stopped selling cigarettes. And
7 the question simply was, do you remember
8 that because your husband was involved in an
9 effort to get that smoking restriction
10 lifted, and she volunteered, yes, he was and
11 he went to, I think she said -- what did she
12 say? American Legion or Veteran's
13 Administration or something; one of the
14 local places here, or rather in Marion,
15 Indiana; one of the local legion clubs or
16 whatever and tried to get them to allow the
17 veterans to smoke there. That was the long
18 and short of it.

19 Now, how all that, when reopened this
20 exhibit as consideration by the Court again,
21 after all the objections that were made here
22 before, I don't have the slightest idea.
23 But this document, you know, there are a
24 number of reasons why it's objectionable.

25 First of all, it's a briefing. It
KREIDER-REDIRECT

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1 doesn't show that anybody said anything. It
2 shows on its face that it's a briefing of a
3 gentleman who apparently was going to give
4 some sort of a speech. It's got a 1989
5 date, it's irrelevant to anything in this
6 case in terms of time, and it essentially
7 discusses petitioning the federal government
8 by a number of different ways and lobbying,
9 all of which were constitutionally
10 protected, which we argued before. It
11 doesn't identify any person who said
12 anything.

13 Its author is not even identified, so
14 there -- I mean, there are a gazillion
15 reasons, Your Honor, why this document ought
16 not to be admitted. Your Honor turned it
17 down, the offer of admission of this
18 document before, and I guess I have to say
19 it's really stretching it now for Mr. Motley
20 to stand up here and say somehow or another
21 we ought to go back and revisit this again,
22 get the jury out of the room, go over this
23 document all over again, delay this trial
24 for another 15 minutes to an hour or so
25 while we reargue something that isn't worthy

KREIDER-REDIRECT

2599

1 of being reargued.

2 MR. MOTLEY: Your Honor, gazillion,
3 whatever that is, frivolous reasons don't
4 make a substantial one. And if we want to
5 get into who is wasting the Court's time, I
6 could make reference to the windiness of

7 Mr. Wagner's objections.
8

9 But, Your Honor, they knew -- they
10 asked this lady these questions in the
11 deposition. They knew what the answer was
12 going to be. And, Your Honor, Dr. Roggli
13 was an expert witness. I don't have the
14 transcript, exactly what you said, but you
15 never foreclosed me, if I recall
16 correctly -- I don't have the transcript in
17 front of me -- every document is not
18 relevant as to every witness. We didn't
19 offer this document with this witness. I
offer it now.

20 Standing by itself, it's relevant,
21 Judge. And as far as this lobbying, there's
22 no such thing as an immunization's of
23 evidence. There's an immunization of claims
24 based on public advocacy. You never ruled
25 any differently from that; you just ruled

KREIDER-REDIRECT

2600

1 with respect to the 1994 testimony of these
2 CEOs.

3 MR. OHLEMAYER: If I may, Your
4 Honor, very briefly.

5 THE COURT: Mr. Ohlemeyer.

6 MR. OHLEMAYER: The first three
7 words of this document are, "Thank you,
8 Bob." The last word is "Sam." We don't
9 know who Bob is; we don't know who Sam is.

10 MR. MOTLEY: I do.

11 MR. OHLEMAYER: You know, Mr.
12 Motley -- Your Honor, I apologize. But at
13 some point if Mr. Motley wants to take the
14 stand and raise his right hand, we'll see
15 how much he knows and how much can be
16 confirmed and corroborated. At the present
17 time we're dealing with a document that
18 describes contact with the veteran's
19 organization. The best evidence of what
20 happened in the VA is the VA policies and
21 procedures.

22 If Mr. Motley wants to put evidence on
23 of that, he's free to do that. If he wants
24 to bring somebody in from the VA to say we
25 would have done this sooner but somebody

KREIDER-REDIRECT

2601

1 told us not to, he can do that. But this
2 document doesn't get him where he wants to
3 go.

4 MR. MOTLEY: Your Honor, we have
5 Answers to Interrogatories, Sam is Sam
6 Chilcoate and Bob is Bob Kloepfer, the vice
7 president of the organization. But that's
8 irrelevant. It's a speech by the president
9 of RJ Reynolds, and in that regard, I don't
10 know how people make a briefing unless they
11 talk about something. Maybe they use sign
12 language; I'm not sure.

13 MR. WAGNER: If this was a
14 document, Your Honor, that was a published
15 speech of some kind and we didn't know to

16 whom it was given, and we didn't know who
17 wrote it, and some of the other things
18 Mr. Ohlemeyer has already pointed out that
19 might elucidate some of these issues, but on
20 its face this document would just be a
21 mystery. The jury would have to speculate
22 about what this document is all about, who
23 said what to whom and all that.

24 And besides that, there is nothing in
25 it that's any kind of admission of any kind.

KREIDER-REDIRECT

2602

1 I mean, it's a poor hearsay document,
2 doesn't have any relevancy to this case.

3 MR. MOTLEY: Judge, the document is
4 not hearsay if it's an admission against
5 interest. I don't know where these guys get
6 these hearsay objections, but it was
7 produced from the Tobacco Institute files,
8 it's a business record, it's stipulated
9 authentic, and it's an 801(d) admission, if
10 by nobody else but Mr. Johnston,
11 Mr. Wagner's client, and by the Tobacco
12 Institute. I'm sorry, Your Honor, I didn't
13 mean --

14 THE COURT: Is there a stipulation
15 that it's authentic from the Tobacco
16 Institute?

17 MR. MOTLEY: Yes, sir, Your Honor,
18 I'll get you that. And if they want to deny
19 that, then I'll bring that in.

20 MR. OHLEMEYER: No, Your Honor, I
21 don't think there's a dispute that it came
22 from the files of the Tobacco Institute.
23 That doesn't make it relevant until we know
24 who Bob is and Sam is --

25 THE COURT: I know.

KREIDER-REDIRECT

2603

1 MR. OHLEMEYER: -- and why this was
2 said and when it was said and whether any of
3 that has any relevance to the issues this
4 jury has to decide.

5 And, quite frankly, if there's anything
6 about the Veteran's Administration that has
7 to do with this lawsuit, it ought to come
8 from either the Veteran's Administration
9 files or from somebody connected to the
10 Veteran's Administration.

11 MR. MOTLEY: Judge, that TI stamp
12 that you see on the front --

13 THE COURT: I see it.

14 MR. MOTLEY: That is the pagination
15 number by court orders that they have to
16 place which files, defendants' files, it
17 comes from and that's the accession number,
18 and that's what that means. For them to
19 stand up here and deny that that's
20 authentic --

21 MR. OHLEMEYER: I did not, Your
22 Honor.

23 THE COURT: No, he didn't deny it
24 was authentic.

MR. OHLEMAYER: I specifically said
KREIDER-REDIRECT

2604

1 where it came from.
2

3 MR. MOTLEY: Mr. Wagner did.
4

5 MR. OHLEMAYER: My point is, you
6 have to do a heck of a lot more than
7 authentic something to have it admitted into
8 evidence.

9 MR. WAGNER: I never said a word
10 about authenticity, Your Honor. My
11 objection rests upon what's in the four
12 corners of this document. It doesn't take
13 two minutes really to review it, Your Honor,
14 to see that it's exactly what I described.

15 You know, and in response to Mr. Motley
16 about what is hearsay and what isn't, there
17 is an exception to the hearsay rule called
18 admissions. But, you know, you get a
19 document that says, I stared out at the moon
20 and I thought to myself, or I surmised about
21 something, or I had some mental musings of
22 some kind, those are not admissions.

23 It has to be something that's a
24 statement of fact, something that we could
25 look at that the author said. The author
has to be somebody that's an agent of the
company, with authority to say it. All of

KREIDER-REDIRECT

2605

1 these elementary evidentiary things all have
2 to be apparent on the face of the document
3 if you don't have a sponsoring witness.
4 This document fails on all scores, on all
5 those steps.

6 MR. MOTLEY: Judge, those all go to
7 the weight.

8 MR. WAGNER: They don't go to the
9 weight.

10 THE COURT: I didn't hear what you
11 said, Counselor, I'm sorry.

12 MR. MOTLEY: I'm sorry, I didn't
13 stand up. He was still talking and I
14 apologize.

15 THE COURT: Let me tell you what my
16 thought is. 33608, I think it's probably
17 been opened up on the relevance issue. But
18 I think, in this case, with this document,
19 there needs to be more evidence as to who
20 Bob may be and who Sam may be.

21 MR. MOTLEY: Your Honor, if you
22 look in the document, it says who they
23 presented and distributed it to. I mean, if
24 Bob was, you know, some jokester --

25 THE COURT: I've looked at it, and
KREIDER-REDIRECT

2606

1 I don't think there's enough there yet.
2 There may be later on, you may be able to
3 prove it.

4 MR. MOTLEY: Well, then I would
5 like leave of the Court to take the
6 deposition of the records custodian of the

7 Tobacco Institute in this case. I'll do it
8 sometime at the Court's convenience.
9 Because they've produced it. We've taken
10 depositions about this document. I don't
11 know that anybody ever asked who Bob was or
12 who Sam was.

13 I happen to know from the time period
14 that Mr. Kloepfer was the vice president,
15 Mr. Chilcoate was an officer, and they were
16 both Tobacco Institute people.

17 I'm at a disadvantage in regard to that
18 right now, Your Honor. I'll try to bring
19 in -- but I'd like to go ahead and take the
20 deposition. I can give you, Judge -- here
21 is a document, the minutes of the Tobacco
22 Institute identifies -- may I approach? I'm
23 sorry.

24 THE COURT: Sure.

25 MR. MOTLEY: Mr. Chilcoate is the
KREIDER-REDIRECT

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1 president -- Sam Chilcoate is the president
2 of the organization. I've already -- I'm
3 sorry. I don't mean to get this close.
4 I've already introduced documents of Robert
5 Kloepfer. You've already admitted documents
6 that show Mr. Bob Kloepfer was the vice
7 president, and here's a report of Samuel
8 Chilcoate, Your Honor, president of the
9 Institute, just two years after this
10 document is dated, if I might show this to
11 you. And you've already introduced, Judge,
12 that Mr. Kloepfer was the vice president
13 during that period of time.

14 Judge, I can run, go take a deposition.
15 I'd be delighted to get one more shot at
16 these guys at the Tobacco Institute. It was
17 liberated in Minnesota this week. If that's
18 what you want me to do, I'll go do that, but
19 I think we've got enough in the record,
20 Judge, as to who Mr. Chilcoate and who
21 Mr. Kloepfer is.

22 THE COURT: The next time we break,
23 if your attorneys over there want to show me
24 where it is in the record that I can
25 determine who these people are, I will take

KREIDER-REDIRECT

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1 a look at that. But --

2 MR. MOTLEY: Yes, Your Honor.

3 THE COURT: It won't be admitted
4 yet. 33608 not admitted at this time.

5 MR. MOTLEY: I take it that I've
6 got a chance to bring it back up again
7 despite what they said that you denied it
8 before?

9 THE COURT: Absolutely.

10 MR. MOTLEY: Thank you.

11 THE COURT: Let's take five
12 minutes, Counsel, and we'll bring the jury
13 back.

14 (A brief recess was taken.)

15 MR. CASSELL: All rise.

- 1 A I retired from the VA in June of '94.
2 Q And how many years did you work at the VA?
3 A 27 years.
4 Q So would that be, if my math is right,
5 that's something around 1967 or thereabouts?
6 A That's correct. 1967, July 1967.
7 Q Great. Now, could you tell us, did you work
8 for the VA continuously through that time
9 period?
10 A Yes, I worked for the VA during all that
11 time. Most of the time I worked in building
12 management.
13 Q Let's just go back to the beginning, if you
14 would kind of briefly relate the different
15 jobs and places you worked for the Veteran's
16 Administration during your 27-year career
17 there.
18 A Okay. When I hired in in July, I worked
19 approximately, just give you approximate
20 dates, about six months in the laundry. I
21 went from the laundry into housekeeping.
22 Both these services were under building
23 management. That's what our service was
24 called.
25 Then from there I went to medical

- 1 administration, and I worked approximately
2 two years in medical administration. And
3 then from there I went as a supervisor for
4 about 23 years for housekeeping. My title
5 was housekeeping aide foreman.
6 Q Housekeeping, I'm sorry?
7 A Housekeeping aide foreman.
8 Q Okay. And would that -- I take it you had
9 people who worked under you then?
10 A Yes, sir. I had -- sometimes I had 15,
11 times I had 30. It depended, if I was
12 pulling relief for another supervisor or if
13 I was just supervising my crew alone.
14 Q And what did the 15 to 30 people that worked
15 under you do?
16 A Well, we did -- various tasks. We were
17 responsible for keeping the hospital
18 sanitary. We were responsible for sweeping,
19 mopping, washing walls, washing ceilings,
20 cleaning restrooms, anything else that you
21 could imagine, just to keep the hospital
22 able to pass accreditation.
23 Q And did you perform this function throughout
24 the 23 years you were in the housekeeping
25 department?

- 1 A Yes, sir.
2 Q Now, might I also ask that during that same
3 23-year period, did you have occasion to go
4 to all areas of the hospital or were there
5 areas you would not go to?
6 A Yes, sir, I went all over the hospital.

7 That's the reason I said I supervised more
8 than 15 sometimes, because when I worked
9 weekends there was a supervisor who had to
10 fill in for me. And then when he worked
11 weekends, I had to fill in for him, so I was
12 over all of the hospital every day.

13 Q And did you yourself personally ever get
14 involved in the actual physical labor of the
15 housekeeping?

16 A Yes, sir, I was a housekeeping aide, like I
17 said, when I left the laundry. I went to
18 housekeeping and worked approximately two
19 years. And I did anything and everything
20 that there was for a housekeeper to do.

21 Q How about after you became a supervisor?

22 A My main focus there was to attendance,
23 disciplinary action, training, and I had to
24 make sure that everyone knew the proper
25 procedures that were expected of them.

BLEVINS-DIRECT

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1 Q And did you -- when you were a supervisor,
2 did you have opportunities then to still
3 continue to go out into the various
4 buildings around the complex?

5 A Yes, sir. That was my job, was to make sure
6 that each person was doing what they were
7 supposed to be doing, what they were trained
8 to do, making sure that the ward that they
9 worked on was kept sanitary and clean. I
10 did on-the-job inspections every day; just a
11 walk-through inspection.

12 Q During this time which you were a
13 housekeeping aide, and then subsequently
14 housekeeping aide foreman, did you become
15 familiar with Building 16?

16 A Yes. I had to pull relief on Building 16 as
17 the housekeeping foreman, and I did go
18 through that building five days out of the
19 week. Whether it was Saturday through
20 Wednesday or whether it was Monday through
21 Friday, I was always through that building.

22 Q Now, during this -- during your years at the
23 Veteran's Administration, up until the time
24 that, let's say up and through the late
25 '80s, would you have had occasion to observe

BLEVINS-DIRECT

2615

1 the presence of cigarette smoke in the
2 buildings where the patients were
3 hospitalized?

4 A Yes, sir. I saw --

5 Q I'm sorry. Go ahead.

6 A I saw cigarette smoke every day until
7 finally it was banned from smoking in the
8 hospital itself. No matter where you went
9 in the hospital, it was smoke. And more in
10 the day rooms. The day rooms were kind of
11 like what we would call maybe a family room
12 at home. That's where the patients were to
13 be most of the day, to smoke, to watch TV.
14 They came and got them there for these other
15 activities they went to, the nursing people

16 would come get them. And that was just
17 their, the living room, family room. It was
18 bad. I mean, it was bad in there.

19 Q How would the presence of cigarette smoke in
20 the quantities you've described affect your
21 job in the housekeeping department?

22 A Well, it made it more difficult to clean
23 because when we had to clean, sometimes we
24 used the Johnson's product to wash the
25 walls, and it was a good product, but

BLEVINS-DIRECT

2616

1 sometimes it just wouldn't cut what was on
2 the walls and what was on the ceilings, what
3 was on the furniture. We had like Naugahyde
4 furniture, and it wouldn't take it off
5 sometimes. So we had to go to other means,
6 sometimes, like I know that I have mixed a
7 floor stripper with water in order to cut it
8 off and then rinse it so that it was
9 presentable so that it was clean again. It
10 was just so much nicotine on there you just
11 couldn't imagine. Just couldn't imagine.

12 Q Were you accustomed to using this floor
13 stripper for the entire time that you
14 described in the housekeeping department
15 until cigarettes were banned eventually?

16 A For certain jobs, yes, sir. Like when the
17 floor that we were using wouldn't cut, we
18 would have to go get something else to take
19 it off. And then wash it again and rinse it
20 again.

21 Q Did this increase -- well, strike that.

22 Were these extra measures you took,
23 were they successful in getting the nicotine
24 off of the ceiling tiles, for example?

25 A Yes. It took it off the ceiling tile. Back

BLEVINS-DIRECT

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1 in those days, when I was a housekeeper and
2 I did the work myself, the ceilings in the
3 day rooms and most of the hallways were
4 metal, like a 12-by-24 inch long metal
5 acoustic ceiling that went up in there. And
6 after we would wash it with the stripper,
7 then we would rinse it off. And then like
8 engineering, if they were going to come over
9 and paint after that, then they would put a
10 coating on it so that the other nicotine
11 that was left behind wouldn't bleed through
12 and then they would paint the surface
13 itself, yes.

14 Q You personally observed these measures being
15 taken?

16 A I've done these measures myself.

17 Q Thank you. And just so that we're clear on
18 this record, Mrs. Blevins, these conditions
19 that you described and these cleaning
20 measures you've described, they took place
21 in Building 16 in addition to other possible
22 places in the hospital; correct?

23 A Yes, sir. That's correct.

24 Q And did you actually perform these services

25 in Building 16 yourself?
 BLEVINS-DIRECT

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1 A No. I didn't perform them in 16. I
2 performed them in 138. But 16 was the
3 building that I pulled relief on, and by
4 that time I was a supervisor and I didn't
5 have to do the work, other than maybe just
6 show someone how to do something like that.

7 Q But you would have supervised employees who
8 did that work in Building 16?

9 A Yes, sir. That's correct.

10 MR. CROSS: Your witness.
11 THE COURT: Mr. Ohlemeyer.

12 CROSS-EXAMINATION

13 BY MR. OHLEMAYER:

14 Q Mrs. Blevins, my name is Bill Ohlemeyer.
15 How is it that Mr. Cross already knew what
16 you were going to say?

17 A You have to ask Mr. Cross that.

18 Q All right. You used the phrase "those
19 days," a few minutes ago. What do you mean
20 by those days? When was those days?

21 A Well, back in those days was when I first
22 hired in and when I was a housekeeping aide
23 myself, when I did the actual on-hands job
24 myself.

25 Q So the hands-on work you described was
 BLEVINS-CROSS

2619

1 something you did in those days which would
2 have been when you hired on.

3 A Back approximately a year after I hired in,
4 yes, sir.

5 Q So that would be '67 or '68?

6 A I hired in in '68.

7 Q Now, you became a supervisor then at some
8 point.

9 A Yes, sir.

10 Q And your assignment as supervisor was in
11 Building 138; right?

12 A My main assignment was 138, yes, sir.

13 Q What does pull relief mean?

14 A Well, if you've got to work five days a
15 week, government workers don't work more
16 than 40 hours a week, so that meant that I
17 had to work from Wednesday through Sunday,
18 Mark, another supervisor, he would work
19 through Wednesday -- whenever I came back on
20 Sunday; he would pull Monday through Friday.
21 And then when we rotated, and I worked like
22 six weeks of pulling relief, then I would
23 have to pull relief for him. But a lot of
24 times he borrowed help from me out of my
25 pool of employees, and I was in his building

 BLEVINS-CROSS

2620

1 every day, Building 16. And then after we
2 lost supervisors, we were cut back on
3 staffing. Everyplace cuts back on staffing,
4 but when we were cut back on staffing, I had
5 the whole front side, including Building 16.

6 Q What do you mean by the whole front side?

7 A Well, there was Building 138, which was four
8 stories high and a basement; the next
9 building down was 124, which was three
10 stories high; the next building was 15, and
11 it was two stories; the next building was 16
12 and it had three stories; and the next
13 building was 17 and it had two stories. So
14 when I say the whole front side, that whole
15 line of buildings that was down through
16 there. Just like down a street, a whole
17 block, it was my responsibility for several
18 years.
19 Q And so you're a supervisor in 138, that's
20 your primary assignment?
21 A That's when I first started as supervisor,
22 yes, sir.
23 Q Then you have to pull relief on the front
24 side?
25 A That's correct.

BLEVINS-CROSS

2621

1 Q And would that be on each floor in each of
2 those buildings?
3 A Yes, sir, that's right.
4 Q How much of that hospital was there when you
5 got there in '67?
6 A All of it except the new building.
7 Q What's the new building?
8 A I don't even know the number of it. I don't
9 go back out there very often, but there is a
10 new building.
11 Q Do you know how long those buildings that
12 you've told us about had been there before
13 you got there?
14 A Well, it was established in '76, 1876.
15 Q 1876?
16 A Uh-huh.
17 Q Do you know if some of those buildings were
18 that old?
19 A Some of the buildings were real old but they
20 were still all occupied.
21 Q You mentioned the word "accreditation."
22 A Accreditation, JCAH.
23 Q What's that?
24 A It's when the hospital has to meet standards
25 to be able to receive monies to help the

BLEVINS-CROSS

2622

1 hospital run.
2 Q Who determines whether the hospital meets
3 those standards?
4 A Someone from Washington came in and made
5 inspections periodically, like every two
6 years.
7 Q Did you ever meet with those people?
8 A No, I did not.
9 Q Do you know -- I'm sorry, you said every two
10 years?
11 A Uh-huh. You're accredited every two years,
12 yes.
13 MR. OHLEMAYER: That's all I have
14 Your Honor. Thank you.
15 THE COURT: Mr. Furr.

16 MR. FURR: Thank you, Your Honor.

17 CROSS EXAMINATION

18 BY MR. FURR:

19 Q Hi, Mrs. Blevins, my name is Jeff Furr. I
20 have a few questions.

21 A Yes, sir.

22 Q You mentioned the painting of the ceilings
23 in Building 16?

24 A Yes.

25 Q During the years that you were a supervisor,
BLEVINS-CROSS

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1 how often were those ceilings painted?

2 A Not too often.

3 Q Every couple years?

4 A No. Probably not even that often.

5 Q Okay.

6 A But we washed them more often than that.

7 Q How often did you wash them?

8 A We tried to every year, to wash them. We
9 tried to strip the walls and everything
10 every year. And then if something was more
11 used, more deteriorated, we tried to work on
12 that more. As, you know, like your
13 restrooms and things, you couldn't go a year
14 without washing those down and cleaning
15 them.

16 Q Were there also some ceilings that you
17 didn't get to every year?

18 A Yes, sir, I'm sure there is.

19 Q Do you recall whether the ceilings in the
20 day room on 16A were cleaned every year?

21 A No, sir. They weren't cleaned in the latter
22 years. I'm talking about the last 20 years,
23 they weren't cleaned every year, because
24 they went to this kind of tile, acoustical
25 board tile.

BLEVINS-CROSS

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1 Q The ceiling in 16A was 12-foot tall, wasn't
2 it?

3 A Yes. We had to use ladders to get into it.

4 MR. FURR: Thank you. That's all I
5 have.

6 THE COURT: Redirect, Mr. Cross.

7 MR. CROSS: Very brief, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. CROSS:

10 Q Mrs. Blevins, can you tell this jury when
11 you met me for the first time?

12 A When did I meet you for the first time?
13 Today.

14 Q And can you tell this jury approximately, we
15 did, in fact, meet briefly before we came
16 over here for your examination today; did we
17 not?

18 A Yes, sir.

19 Q Can you tell the jury how long you and I
20 talked about what you would be testifying to
21 here today?

22 A Two minutes maybe.

23 MR. CROSS: Thank you. No further
24 questions.

1 Honor.

2 MR. FURR: Nothing, Your Honor.

3 THE COURT: Ma'am, the lawyers tell
4 me you will not be recalled as a witness, so
5 you are excused from your subpoena. You may
6 step down.

7 THE WITNESS: Thank you very much.

8 THE COURT: Thank you. Call your
9 next.

10 MR. CROSS: Plaintiffs would call
11 Reverend Donald Kochanek.

12 THE COURT: Good afternoon. Would
13 you raise your right hand.

14 PLAINTIFFS' WITNESS, DONALD KOCHANEK, SWORN

15 THE COURT: Have a seat right
16 there, sir. You might pull that up just a
17 little bit. Thank you. Well, whatever.

18 Tell the jury your name.

19 THE WITNESS: Donald R. Kochanek.

20 THE COURT: Spell your last name.

21 THE WITNESS: K-O-C-H-A-N-E-K,
22 Polish.

23 THE COURT: Go ahead, Counselor.

24 MR. CROSS: Thank you, sir.

25 DIRECT EXAMINATION

KOCHANEK-DIRECT

1 BY MR. CROSS:

2 Q Mr. Kochanek, you have a title; do you not?

3 A Chaplain.

4 Q You refer to yourself as chaplain?

5 A Yes. I'm also an Army chaplain and VA
6 chaplain.

7 Q What's the difference between a chaplain and
8 a reverend?

9 A Same.

10 Q Okay. So if I call you reverend, will you
11 not be offended?

12 A I'll answer you.

13 Q All right. Good deal.

14 Q Where do you live, sir?

15 A I live in [DELETED].

16 Q What's your address?

17 A [DELETED].

18 Q And is that in the county or is that in town
19 or where is that?

20 A It's about a mile out of town, in the county
21 of [DELETED].

22 Q I'm going to ask you to look at this jury
23 when you're giving your answers because I do
24 know the answers to some of those questions,
25 but I'd like for them to know the answers

KOCHANEK-DIRECT

1 too.

2 Mr. Kochanek -- Reverend Kochanek, are
3 you an Army veteran?

4 A Yes, I am an Army veteran of two wars,
5 Korean War and Vietnam War.

6 Q When did you serve in the Army?

7 A I served in the Army from '67 to '75 as
8 active duty, and then I was in reserves and
9 retired from the reserves. I was a
10 lieutenant colonel.
11 Q And whereabouts did you serve?
12 A I served in Vietnam, Okinawa, Germany, and
13 all over the United States.
14 Q Can you tell the jury a little bit about the
15 kind of things you did while you served in
16 our nation's military?
17 A As a chaplain, regular services like a
18 pastor, counseling services. I usually work
19 with basic trainees, so I was at Fort Ord,
20 California, for three years where I had a
21 lot the lectures to give them. They had
22 four lectures to -- they had on, it was
23 human basic training for eight years,
24 preparing -- eight years -- eight weeks
25 preparing for, to go over to Vietnam.

KOCHANEK-DIRECT

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1 Q Okay. And might I ask you what denomination
2 you are a chaplain in?
3 A I'm Baptist, General Baptist. General
4 Associate Regular Baptist.
5 Q I'm not familiar with the different
6 denominations.
7 A There are many different kinds of baptists,
8 Southern Baptist, there's Independent
9 Baptist, there's Decedent Spirit Baptist.
10 You name them, there are just all kinds of
11 Baptists, and General Baptist is what -- I
12 was endorsed for the military by the General
13 Baptists.
14 Q All right. Subsequent -- when did you --
15 are you still in the reserves?
16 A No. I retired from the reserves in June of
17 '92.
18 Q Okay. So let me go back a step. Are you a
19 family man?
20 A Yes, I have -- raised five children. I'm
21 married, raised five children.
22 Q Have grandchildren?
23 A Yes. I have 12 grandchildren.
24 Q Do you have any regular employment at this
25 particular time?

KOCHANEK-DIRECT

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1 A I'm retired from the VA; however, I am on a
2 fee basis. That means when one of the
3 chaplains takes off on vacation or someone
4 gets sick, I fill in for them.
5 Q I believe you stated you're retired from VA
6 now?
7 A Yes, I retired from VA in January of 1992.
8 Q So that presupposes there was a period of
9 time where you worked on a regular basis at
10 the VA.
11 A That is correct.
12 Q When did you begin that employment?
13 A I started in 1980 and worked -- retired in
14 1992.
15 Q Do you know Mildred Wiley?

16 A Yes, I did.
17 Q And did you know her during that period of
18 1980 to 1991, say, when she died? Did you
19 know her during that entire time?
20 A I knew her for about -- during about seven
21 years, from -- got to know her pretty well,
22 about '87 to '92.
23 Q All right. Now, tell the jury, if you
24 would, what kind of employment activities
25 you had during that 12 years you were at the
KOCHANEK-DIRECT

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1 VA Hospital.
2 A Okay. Ordinarily the chaplain's main duty
3 was to be seen by the patients, and we would
4 visit all of the different buildings where
5 patients were located. We also held chapel
6 services. We held services on the buildings
7 themselves on different days. We also had
8 lectures. And we also did counseling. And
9 we also, since it was a national cemetery in
10 Marion, we also had a lot of times we'd have
11 burials, too, that we'd have. If the family
12 did not have a minister, we would conduct
13 the service; whatever they asked for, we
14 would take care of it.
15 Q What parts of the hospital did your work
16 take you to during this time?
17 A All different parts, actually, during my 12
18 years.
19 Q Were there particular buildings in the
20 hospital that you might have worked in --
21 A Yes.
22 Q -- more than others?
23 A In about 1987, I think it was about 1987 to
24 1992 I asked if I could work primarily in
25 the medical buildings, 138, and then also I
KOCHANEK-DIRECT

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1 was given Building 15B, B meaning the second
2 floor, 16A, B, and C, and 17B, and then I
3 had the psych building, suicidal, assaultive
4 patients, Building 4.
5 Q Why did you ask for those responsibilities?
6 A I asked for the medical building because I
7 thought it would be better to have one
8 chaplain all the time visiting that medical
9 building where the patients were getting
10 better in their care, someone they would get
11 to know. And that's why I asked for the
12 medical building.
13 Q How many years did you have occasion to
14 frequent Building 16 on a regular basis?
15 A At least seven years, seven years or more,
16 yes.
17 Q And was this the same seven years that you
18 got to know Mrs. Wiley?
19 A Yes, that's correct.
20 Q Can you tell this jury what you observed
21 about her and her person and her character.
22 A Yes, she was an excellent nurse. She took
23 her job very seriously. She was a hard
24 worker. She usually, even a lot of times,

25 even though there was nurse's aides, nurses
KOCHANEK-DIRECT

2632

1 there, she always did her share. She was
2 out working all the time. A lot of times
3 even she would say, I'll go check on patient
4 so and so, and she did so.

5 Q Let me go back to a question I omitted from
6 back in the days of your military service.
7 And in particular, in the '60s and early
8 '70s, did you have occasion to observe
9 whether or not the servicemen who you would
10 counsel as a chaplain would obtain free
11 cigarettes from any source?

12 MR. OHLEMAYER: Objection, Your
13 Honor, relevance.

14 MR. WAGNER: Objection.

15 MR. CROSS: Your Honor, it's the
16 basis for the entire fact that all these
17 veterans had a smoking habit.

18 THE COURT: Objection sustained.

19 MR. CROSS: Question withdrawn.

20 We'll move on.

21 Q What was the -- did you have occasion to
22 observe the presence of smoking, smoking,
23 cigarette smoke in the wards where you
24 chaplainied at the VA Hospital?

25 A Yes, very much so.

KOCHANEK-DIRECT

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1 Q And could you describe for this jury what
2 the condition of the smoke was on Building
3 16?

4 MR. WAGNER: Isn't this cumulative
5 at this point?

6 THE COURT: I'll allow him to
7 answer that question, but we have heard
8 several witnesses on this. But you can
9 answer that question.

10 A Yes, there was smoking on 16A. Usually they
11 had the patients, since these patients were
12 total care, they were usually in geri,
13 called geriatric chairs. They're larger
14 than a regular wheelchair. They'd fold
15 down. And usually these patients were total
16 care, and even some of them had to hold the
17 cigarette in their mouth for them to smoke,
18 had to watch them pretty closely, that they
19 didn't burn themselves. Some even had burn
20 marks, you know, on their clothing.

21 Q You observed that yourself.

22 A Oh, yes.

23 Q Did you -- was there any physical -- did you
24 observe any physical, any physical
25 observations as to the -- on the walls or

KOCHANEK-DIRECT

2634

1 the ceilings as to the presence of cigarette
2 smoke?

3 A Especially the ceiling. They were usually
4 brown. And they used to change the tile
5 every so often.

6 Q You did see that.

7 A Yes.
8 Q Okay. What kind of ventilation did you
9 observe in Building 16 during the years you
10 worked there?
11 A I don't really remember that, as far as the
12 ventilation goes. I don't remember if they
13 had any fan in the window or not. I think
14 the windows were usually closed most of the
15 time.
16 Q I'm sorry. Were you finished?
17 A Yes.
18 Q Okay. During this 12-year period that you
19 worked in there, do you recall any measures
20 that may have been taken that might have
21 dissipated the smoke at all? If there were
22 fans, for example, were they working?
23 A Well, I just went back to check. I see they
24 had a fan in there now, in one of the
25 windows. But they did bring smoking eaters
KOCHANEK-DIRECT

2635

1 in later on.
2 Q Did those work?
3 A Not very well. You could hear them snapping
4 and make noise and things, but they didn't
5 really take all the smoke out.
6 Q Okay. Now, during the time -- are you
7 familiar with the fact that Mrs. Wiley
8 became a head nurse and was given an office
9 of her own in that building?
10 A Yes.
11 Q Did you observe her as she conducted her
12 duties as head nurse in those years?
13 A Yes, I did observe her, yes.
14 Q Did Mrs. Wiley stay in her office with the
15 door closed or did she do other things?
16 A Ordinarily, if her door was closed, she was
17 talking to an aide or a nurse or someone
18 else.
19 Q Did that happen very often?
20 A No, it did not. Her door usually was always
21 open.
22 Q Even when she was in there?
23 A Yes, that's correct.
24 Q And was there anyplace in that building that
25 the smoke did not reach?
KOCHANEK-DIRECT

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1 A It's a possibility that way down on the east
2 side, way, way down the hall, you know, at
3 the other end, maybe so. I don't know about
4 that.
5 Q But for the most part, everywhere you
6 observed in Building 16, the smoke was
7 there.
8 MR. WAGNER: Leading and
9 suggestive, Your Honor.
10 THE COURT: Leading. Sustained.
11 Q Other than way down on the east side, can
12 you think of any other place where the smoke
13 did not reach?
14 A No, I cannot.
15 Q And how thick was the smoke on the first

16 floor of Building 16?
17 MR. OHLEMAYER: Objection, Your
18 Honor, lack of foundation as to time.
19 Q At anytime during the years you worked
20 there.
21 A It was smoke. I know that. Very much so.
22 And I don't know. The area where they
23 smoked was right across from the nurse's
24 station, and it was a small area. It wasn't
25 very large. I would say it was about 20 by
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1 about 10 deep, something like that. And
2 usually there may be about 12 guys in there,
3 usually in geri chairs. Most of them are
4 geri chairs.

5 Q Thank you. Are you a smoker, Reverend?
6 A No, I'm not. No, I'm not.
7 Q For my last question Reverend Kochanek, this
8 question has been passed to me by my
9 co-counsel. He wants me to ask you if a
10 General Baptist is the same as a Southern
11 Baptist.

12 A No, it is not.

13 MR. CROSS: Thank you.

14 MR. OHLEMAYER: No questions, Your
15 Honor. Thank you, Reverend.

16 THE COURT: Mr. Wagner, any
17 questions?

18 MR. WAGNER: No questions.

19 THE COURT: Thank you, sir. Call
20 your next.

21 MR. CROSS: May Reverend Kochanek
22 be released?

23 THE COURT: You don't intend to
24 recall?

25 MR. OHLEMAYER: We haven't
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1 subpoenaed him.

2 MR. WAGNER: We haven't subpoenaed
3 him, Your Honor. Apparently the plaintiffs
4 subpoenaed him, not us.

5 THE COURT: You are released from
6 your subpoena.

7 THE WITNESS: Thank you.

8 THE COURT: Thank you.

9 MR. MOTLEY: Dr. David Burns, Your
10 Honor.

11 THE COURT: All right. Would you
12 raise your right hand.

13 PLAINTIFFS' WITNESS, MICHAEL BURNS, M.D., SWORN

14 THE COURT: Would you have a seat,
15 please. Would you tell this jury your name.

16 THE WITNESS: My name is David
17 Michael Burns.

18 THE COURT: Spell your last name
19 for the record.

20 THE WITNESS: B-U-R-N-S.

21 DIRECT EXAMINATION

22 BY MR. MOTLEY:

23 Q Doctor, I hope you're feeling better today.

24 A Well, I'm about 90 percent, but I appreciate

25 that. Thank you.

BURNS, M.D.-DIRECT

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1 Q You've been with us for a while
2 unfortunately, haven't you?

3 A Well, part of that was my own doing, I
4 guess.

5 Q And where did you come here from?

6 A From San Diego, or, actually I came from
7 Japan, but I live in [DELETED]

8 Q What were you doing in Japan?

9 A I was speaking at an international
10 conference on mechanical ventilation.

11 Q On ventilation for buildings?

12 A No. No. It's breathing for people in
13 intensive care units. Machines that breathe
14 for people.

15 Q You were born May 6, 1947?

16 A Yes, sir, I was.

17 Q And you and I have accents. The jury
18 already knows where mine comes from. What
19 about yours?

20 A Well, most of mine comes from growing up in
21 Boston, Brookline, Jamaica Plain, which are
22 suburbs of the city of Boston.

23 Q You are married?

24 A I am.

25 Q You have children?

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1 A I have one child, a 13-year-old boy.

2 Q You went to Boston College in Massachusetts
3 and got a B.S. degree in biology in 1968; is
4 that correct?

5 A That's right.

6 Q You went to Dartmouth Medical School in New
7 Hampshire and received a BMS in medicine in
8 1970?

9 A That's right.

10 Q What is a BMS?

11 A That's a Bachelor of Medical Science.

12 Q And what is that?

13 A The first two years of medical school are
14 basic science years. They are anatomy,
15 physiology, molecular biology, chemistry,
16 different topics that are largely taught in
17 the classroom. So I took the first two
18 years at Dartmouth. At the end of that
19 period of time, they gave us what was
20 referred to as a Bachelor of Medical
21 Science.

22 Q And then you received your medical degree in
23 1972 from what medical school, sir?

24 A I graduated from Harvard Medical School with
25 my doctorate in 1972.

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1 Q And that, of course, is in Boston?

2 A Yes. It is.

3 Q And your current position is what?

4 A I'm Professor of Medicine at the University
5 of California School of Medicine in the
6 Division of Pulmonary and Critical Care

7 Medicine.
8 Q And are you what's known as a full professor
9 of medicine?
10 A That's correct.
11 Q And how long have you been in teaching in
12 medical schools, Dr. Burns?
13 A I've been teaching in medical schools, well,
14 largely since graduating from medical
15 school, but I've been on the faculty as UCSD
16 since 1979.
17 Q 19 what?
18 A '79.
19 Q You're the coordinator of the Developmental
20 Pulmonary Clinical Research Lab?
21 A That's correct.
22 Q So that no one knows this is a mystery, I
23 have your resume here, don't I?
24 A Yes, you do.
25 Q Okay.

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1 MR. MOTLEY: In the interest of
2 time, Your Honor, on these non-controversial
3 questions, if I can just ask him about that,
4 save us some time?

5 MR. OHLEMAYER: No objection.
6 Q What is the Developmental Pulmonary Research
7 Clinical Laboratory?
8 A Well, a lot of the newer testing modalities
9 for patients in the hospital have to be
10 evaluated. We do evaluations of equipment
11 that the manufacturers bring in for us to
12 assess whether they actually do what they
13 say they do. And we also work with
14 manufacturers to help them develop new and
15 better equipment to help take care of
16 patients in intensive care units and other
17 environments.
18 Q Doctor, you are a critical care and lung
19 specialist; is that correct?
20 A That's correct.
21 Q Does that include cancer in what you do?
22 A It most certainly does.
23 Q And you are also the medical director of
24 respiratory therapy.
25 A That's right.

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1 Q Explain that, please, what is respiratory
2 therapy?
3 A Respiratory therapy is the care of the
4 respiratory system in a hospital. By and
5 large the bulk of that care, it revolves
6 around delivery of artificial ventilation
7 with machines. The rest of the care is
8 related to delivery medicines that open up
9 the airways, help people breathe and help
10 people clear secretions and also deliver
11 oxygen to people.

12 I'm responsible for the overseeing of
13 the care that is provided throughout the
14 institution for those modalities of care.

15 MR. MOTLEY: Your Honor, may I give

16 the witness this?
17 THE COURT: Go ahead.
18 THE WITNESS: Thank you.
19 Q Is the University of California at San Diego
20 part of the University of California
21 educational system, sir?
22 A Yes, it is. It's one of the five medical
23 schools in the University of California
24 system.
25 Q And what courses do you teach at the medical
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1 school?
2 A I teach critical care medicine, I teach
3 respiratory physiology, physiology. I also
4 teach the diagnosis and management of
5 pulmonary illnesses, and I instruct the
6 second year class in cessation from
7 cigarette smoking.
8 Q Doctor, you're the second medical doctor
9 who's testified, I believe. And so the
10 other one was a pathologist, Dr. Roggli. If
11 memory serves me correctly, Dr. Roggli
12 looked -- told us he looked threw
13 microscopes and things like that. Are you a
14 doctor who actually takes care of patients
15 and listens to their chest and takes
16 histories from them?
17 A Yes, I am.
18 Q And how long have you been doing that?
19 A Well, I've been doing that again since
20 before I graduated from medical school. The
21 last two years of medical school are spent
22 in clinical care of patients. And I've been
23 taking care of patients at the University of
24 California since I became a fellow there,
which was 1976, and it's been part of my
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1 responsibilities as a member of the faculty
2 since 1979.
3 Q Doctor, again looking at this, one of the
4 witnesses called it a cheat sheet or, I did
5 for them. This is your resume here. You
6 have been a medical officer of the National
7 Clearinghouse for Smoking and Health, the
8 Bureau of Health Education, the Center for
9 Disease Control in Atlanta, Georgia, for two
10 or three years?
11 A That's right. After completing my residency
12 on the Harvard Medical Service at Boston
13 City Hospital, I joined the Public Health
14 Service and was medical officer for the
15 National Clearinghouse for Smoking and
16 Health.
17 Q And the Center for Disease Control, I think
18 most of the folks on the jury know what that
19 is, but for the record, so we'll have a
20 complete record, would you state what the
21 CDC is?
22 A The Center for Disease Conrol is now the
23 Center for Disease Control and Prevention,
24 and it is the agency of the Public Health

25 Service which is responsible for monitoring,
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1 evaluating, and preventing disease.

2 Q As a medical officer for the National
3 Clearinghouse for Smoking and Health from
4 1974 to '76, what did you do?

5 A There was a number of responsibilities. The
6 principal one was to author the 1975 Report
7 of the Surgeon General on Smoking and
8 Health.

9 Q You were actually the author of the Surgeon
10 General's Report on Smoking and Health.

11 A That's correct.

12 Q And that was?

13 A 1975. At that time, the report was prepared
14 internally. It was prepared by the medical
15 officers at the National Clearinghouse for
16 Smoking and Health and then was sent out for
17 extensive external review.

18 Q What was that report of 1975 by the Surgeon
19 General on Smoking and Health called, do you
20 recall?

21 A There was no special name for it at that
22 time. That was a report that reviewed all
23 the information in the past year in
24 published medical literature on smoking and
25 health, and it had a special individual

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1 chapter on involuntary smoking or exposure
2 to environmental tobacco smoke.

3 Q Now, Doctor, you have been the author or an
4 editor or contributor to more than one
5 Surgeon General's report?

6 A That's correct. I've been an author, editor
7 or senior reviewer for every Surgeon
8 General's Report since 1975.

9 Q And how many reports are those?

10 A Oh, let me think. '75, '76, '79, '80, '81,
11 '2, '3, '4, '5, '6, '89, '90, '92 and '94,
12 as well as actually one other one that is
13 not traditionally included in that group,
14 which was on smokeless tobacco.

15 Q Smokeless tobacco?

16 A That's correct.

17 Q That's like?

18 A Chew.

19 Q Chew.

20 A That's right.

21 Q Doctor, after you finished being the
22 principal author of the 1975 Surgeon
23 General's Report, did you then take further
24 education?

25 A Yes. I spent three years as a pulmonary

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1 fellow at the University of California San
2 Diego in the pulmonary division, their lung
3 disease division.

4 Q And are you board certified? First explain
5 what board certification means for a doctor
6 that treats patients.

7 A Board certification is a process of
8 certifying that someone has reached a
9 certain level of experience and training, as
10 well as a certain level of knowledge, which
11 requires a completion of a set, prescribed
12 set of experiences over a period of time.
13 And then you're allowed to sit for an
14 examination. If you pass the examination,
15 then you are then board certified. I am
16 board certified in internal medicine, in
17 pulmonary medicine, and have a certificate
18 of special accomplishment in critical care
19 medicine.
20 Q Doctor, have you been a consultant to the
21 Office on Smoking and Health from 1979 until
22 presently?
23 A Yes, I have.
24 Q What is the American College of Chest
25 Physicians?

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1 A American College of Chest Physicians is a
2 group of physicians who care for diseases
3 within the chest. That includes pulmonary
4 physicians, cardiologists and chest
5 surgeons. And they have a journal, they
6 also have a set of meetings, and an
7 educational program that they conduct.
8 Q Have you been on the research advisory board
9 for the Institute for the Study of Smoking
10 Behavior and Policy at the John F. Kennedy
11 School of Government at Harvard University?
12 A Yes, I have.
13 Q What is that, sir?
14 A That was an institute set up at the Kennedy
15 school to examine the public policy issues
16 surrounding tobacco use, particularly
17 surrounding the issues of trying to examine
18 how governmental actions, taxation, various
19 other actions influence the way people start
20 to smoke and whether or not they try to
21 quit.
22 Q Sir, have you been a policy advisory
23 committee member for the Community
24 Intervention Trial For Smoking Cessation of
25 the National Cancer Institute?

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1 A Yes.
2 Q And what is the National Cancer Institute?
3 A The National Cancer Institute is one of the
4 institutes of the National Institute for
5 Health. They are the principal agency that
6 is tasked with investigating research level
7 to the causes and treatment of cancer.
8 Community Trial was a trial in 11 different
9 communities of a community-based, that is an
10 effort that was based on the entire
11 community, to see whether they could change
12 smoking behavior. They used a variety of
13 different modalities, media, quit
14 information assistance at the physician
15 level and a variety of other interventions

16 to try and help people build support within
17 the community and also to help people as
18 individuals to quit.
19 Q Have you been a consultant to the
20 Environmental Protection Agency or commonly
21 known as EPA?
22 A Yes.
23 Q Their indoor air quality advisory committee?
24 A That's correct.
25 Q That was from 1990 to 1991?

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1 A That's correct. I was on the science
2 advisory board for -- it's actually went
3 through 1992, I believe, but I was on the
4 science advisory board for the, what is
5 referred to as the EPA Report, looked at
6 environmental tobacco smoke.
7 Q And I believe that that's Exhibit No. 50154.
8 MR. MOTLEY: Mr. Cassell, might I
9 look at that? It's one of those two
10 books -- should be one of those two right
11 there.

THE WITNESS: Second one.

MR. MOTLEY: Second one. This one.

May I approach, Your Honor?

THE COURT: Go ahead.

16 Q It's 50234. Would you hold that up and
17 explain what that is, please, Doctor.
18 A This is the report by the Environmental
19 Protection Agency on "The Respiratory Health
20 Effects of Passive Smoking, Lung Cancer and
21 Other Disorders." This is volume, actually,
22 is a printing of that that was reprinted by
23 the National Institute for Health because
24 there weren't enough copies to meet the
25 demand printed by the EPA.

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1 Q Is this a copy of the original?
2 A That's a copy of the original. They are
3 essentially the same document.
4 Q And your role in this document, which has
5 been admitted into evidence, was what again,
6 sir?
7 A I was on the science advisory board. The
8 document itself was prepared by EPA, went
9 through an extensive review internally, went
10 through a science advisory board review,
11 which was a public review. That is, people
12 who were interested in the topic came and
13 presented to the science advisory board,
14 went back, was revised again, and again went
15 through the same process a second time.

16 My responsibility was to be on that
17 science advisory board which included about
18 15 people, I think. And we were asked to
19 evaluate whether the information was correct
20 and accurate and provide them advice about
21 how the report should be structured and
22 modified.

23 Q Sir, were you -- what is the U.S. Consumer
24 Safety Product Commission?

25 A The U.S. Consumer Product Safety Commission
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1 is that agency of the federal government
2 that is tasked with making sure that the
3 products that we all buy are safe.

4 Q And were you a member of the U.S. Consumer
5 Product Safety Commission on fire-safe
6 cigarettes?

7 A That's correct. They had a special
8 commission that was looking into trying to
9 design, or whether it was possible to design
10 characteristics of a cigarette that would
11 make it fire-safe. That is, that would
12 allow a cigarette to fall on a couch, for
13 instance, and not set the couch on fire.

14 Q What is the American Cancer Society, sir?

15 A The American Cancer Society is a voluntary
16 health agency that is interested in the
17 diagnosis, management, and cure of cancer.
18 It's a voluntary health agency. It collects
19 donations, and uses those donations to
20 provide service in the community as well as
21 to conduct research.

22 Q Were you the president of the San Diego unit
23 of the American Cancer Society?

24 A Yes, I was.

25 Q What is the American Lung Association?

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1 A The American Lung Association is also a
2 voluntary health agency, similar to the
3 American Cancer Society. And its principal
4 interests are lung disease, including lung
5 cancer and chronic obstructive lung disease.

6 Q Were you a member of the board of directors
7 of the Lung Association of San Diego?

8 A Yes, I was.

9 Q Have you served as an expert witness for the
10 Attorney General of the state of Canada?

11 A Yes, I have. It's actually not a state
12 but --

13 Q Excuse me. That's true. The nation of
14 Canada.

15 A Yes. I have.

16 Q And what was that -- does that have any
17 relationship with what we're talking about
18 here?

19 A It did. The country of Canada had passed
20 legislation.

21 Q Just tell us it had to do with cigarettes.

22 A It did, yes. I'm sorry.

23 Q That's okay. Now, I want to ask you about
24 some awards that you may have received. Did
25 you receive the United States Surgeon

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1 A General's medallion?

2 A Yes, I received the Surgeon General's
3 medallion from Dr. Koop.

4 Q From Dr. Everett Koop, the gentleman with
5 the beard.

6 A That's correct.

7 Q Did you receive the American Lung
8 Association Life and Breath, B-R-E-A-T-H,
9 Award for distinguished community service?
10 A I did receive the Life and Breath Award.
11 Q Doctor, without going through all of these,
12 I want to hand you a seven-page list of
13 publications of yours and ask you to confirm
14 that these are all scientific publications
15 that you've authored.
16 A Yes. This appears to be an accurate copy of
17 my CV.
18 Q In addition to the Surgeon General's
19 Reports, have you authored scientific
20 articles on cigarette smoking and health?
21 A Yes, I have.
22 Q And do you maintain an interest in that
23 currently, sir?
24 A I certainly do.
25 Q In fact, sir, did you serve as a consultant

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1 to the Koop/Kessler committee?
2 A I did.
3 Q Would you explain what the Koop/Kessler
4 committee was and when it issued its report?
5 A I can't give you the exact date, but it
6 issued its report earlier last year.
7 MR. OHLEMAYER: Excuse me, Your
8 Honor, may we approach for a minute?
9 (Bench discussion)
10 (Discussion off the record)
11 Q Doctor, without going into the Koop/Kessler
12 report --
13 A Right.
14 Q -- your involvement was on the science end,
15 I take it?
16 A That's correct. I was a scientific
17 consultant to that group.
18 Q And in the science aspect of that, did you
19 look into issues such as addiction?
20 A Yes.
21 Q The additives in cigarettes?
22 A Yes.
23 Q Of the diseases caused by cigarettes?
24 A That report didn't specifically deal with
25 diseases, but certainly that's the substrate

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1 on which it was based.
2 Q I said Koop/Kessler, not -- for some reason,
3 my chart here looks like the Leaning Tower
4 of Pisa. And I don't know why I can't --
5 but you already told us who Koop was. Who
6 is Kessler?
7 A Dr. Kessler is currently, I believe, the
8 Dean of the Yale Medical School. He was the
9 former head of the Food and Drug
10 Administration.
11 Q Now, Dr. Burns, as part of your clinical
12 practice, do you, over the years, have you
13 treated people who had what you believed to
14 be cigarette-related lung disease?
15 A Absolutely.

16 Q Including lung cancer?
17 A Lung cancer and chronic obstructive lung
18 disease are one of the principal sets of
19 diseases we see as a pulmonary physician.
20 MR. MOTLEY: Your Honor, could you
21 inquire if the jury can hear him?
22 THE COURT: Can you hear the doctor
23 all right?
24 You might move just a little closer to
25 the mike. Thank you.

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1 MR. MOTLEY: Judge, could I move
2 over this way a little bit?
3 THE COURT: Surely. Not if you'll
4 talk loud enough for me to hear, I believe
5 the jury can hear.
6 Q Dr. Burns, in the course of treating
7 patients, do you treat patients for a
8 dependency upon nicotine?
9 A Yes, I do.
10 Q What does it mean? What is dependency upon
11 nicotine called? What's the common term for
12 it?
13 A The common term is addiction.
14 Q Would you explain what it is in your
15 personal experience you do to try to help
16 people who have a dependency or addiction to
17 nicotine.
18 MR. OHLEMAYER: Objection, Your
19 Honor. Relevance.
20 MR. MOTLEY: Your Honor, you've
21 already permitted testimony about this.
22 Goes to the dangerousness of cigarettes.
23 THE COURT: Objection overruled.
24 You may answer, Doctor.
25 A Principally the characteristics of an

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1 addiction is that you lose control over, or
2 volitional control over the next use of an
3 agent. You no longer make a free choice
4 about whether you continue to use it and
5 that becomes a compelling and compulsive use
6 of that agent even when it causes you
7 injury.
8 What we do is we try to provide people
9 with a variety of different approaches to
10 quit it. One of them is to support them
11 behaviorally, give them some behavioral
12 counseling, teach them some behavioral
13 approaches.
14 We also use a variety of methods by
15 which we replace the nicotine that they've
16 been getting from cigarettes. Initially we
17 used chewing gum containing nicotine. More
18 recently we have been using patches which
19 transfer the nicotine through the skin, and
20 nasal inhalers which allow the nicotine to
21 be absorbed directly through the mucus
22 membranes of the nose.
23 Q Have you written or participated in
24 publications about the dependency or

25 addiction of nicotine?

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1 A Certainly. Among others I was the senior
2 reviewer for the 1988 Surgeon General's
3 Report on Nicotine Addiction.

4 MR. MOTLEY: May I approach the
5 witness, Your Honor?

6 THE COURT: Go ahead.

7 Q Would you hold this, tell the jury what this
8 is.

9 A Yes. This is the Surgeon General's Report,
10 from the year 1988, and this entire report
11 was devoted to the discussion of the topic
12 of nicotine addiction. It is -- the report
13 concluded that cigarette smoking is an
14 addictive behavior and that nicotine is the
15 agent that is the addictive agent in
16 cigarettes.

17 Q And what was your role in that?

18 A I was the senior reviewer for that document.

19 Q Just briefly, what does that mean?

20 A That means the Surgeon General's Report has
21 a two-stage review. There are authors, and
22 its edited internally, and then it goes
23 through a review at each chapter level. All
24 the chapters are then combined into a single
25 volume, sent out to senior reviewers who

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1 look at the balance, tone, and content of
2 the document and provide a written response
3 to the Office on Smoking and Health.

4 Q Can you see what I write up here? I'll tell
5 you what it is. See if you can't see it.
6 If we were to see the term "narcotizing,"
7 have reference to the term "narcotizing," as
8 a scientist, what does that mean, sir?

9 A In general it means something that produces
10 a narcotic-like effect.

11 Q What is a narcotic-like effect?

12 A Which is a sedative, mildly euphoric-type
13 effect.

14 Q Euphoric?

15 A Can also be euphoric, yes.

16 Q What does euphoric mean?

17 A Means it produces a sense of distancing from
18 reality and pausative sense of well-being.

19 Q I probably qualify for a doctor since I
20 can't write very well. Anybody's ever read
21 a doctor's prescription.

22 A It was one of the prerequisites of being a
23 physician, I'm afraid.

24 Q What does tranquilizing mean?

25 A Tranquilizing means it reduces your level of

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1 energy and awareness. It sedates you, makes
2 you quiet and less anxious.

3 Q Does nicotine in cigarettes, in the smoking
4 of cigarettes, have a narcotizing and
5 tranquilizing effect on those who smoke?

6 A Yes, it does.

7 Q It does. Now, Doctor, I want to ask you,
8 I'm going to be going into some scientific
9 areas with you with the Court's permission,
10 and you understand that in a court of law
11 you can't guess or speculate?
12 A I do.
13 Q You're supposed to base your answers on
14 reasonable -- reasonable scientific
15 certainty, more likely true than untrue?
16 A That's true.
17 Q Okay. Before I go into those scientific
18 issues, let me ask you, having been
19 affiliated with the Surgeon General's Office
20 since, I guess since 1973, through the --
21 A '75.
22 Q '75?
23 A Right.
24 Q Have you come to learn a bit about the
25 history of the United States Surgeon

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1 General's Office?
2 A Yes, I have.
3 Q And when was the U.S. Surgeon General's
4 Office first formed?
5 A I can't give you the exact date, but it was
6 well over a hundred years ago now, and it
7 was part of an effort to deal with some of
8 the epidemics that were occurring in the
9 country at the time.
10 Q And has the surgeon general's office been in
11 existence for over a hundred years now?
12 A Yes, it has.
13 Q The jury will hear the name Jessie
14 Steinfeld, S-T-E-I-N-F-E-L-D. Can you tell
15 the jury if you know Dr. Steinfeld?
16 A Yes, I do. I know Steinfeld well. He was
17 the surgeon general in 1968 or '9 through
18 about 1971.
19 Q And how did you -- don't tell us anything
20 about him, but how do you, personally have
21 you met his acquaintance?
22 A I met him through my work at the Office on
23 Smoking and Health when I was in the Public
24 Health Service and have maintained a
25 relationship since that time based on the

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1 work I have, I've done on tobacco control
2 and tobacco and health as well as he has
3 been a senior reviewer for the Surgeon
4 General's Reports during the time that I was
5 involved with them.
6 Q Can you continue to try to speak up a little
7 bit, Doctor?
8 A I will.
9 Q I know you've not been exactly with it
10 completely here the last two days.
11 What about a Dr. Julius Richmond?
12 MR. MOTLEY: Spelled just like the
13 town, ma'am.
14 A Dr. Richmond was also surgeon general. He
15 was surgeon general during 1968, I believe

16 through --
17 Q Julius Richmond now.
18 A Oh, I'm sorry.
19 Q 1978?
20 A '78 through about '82. He was the surgeon
21 general that we -- I worked with on several
22 of the reports.
23 Q While we're mentioning that, would you just
24 tell -- we may get into some of these later.
25 Would you just one-by-one tell the ladies

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1 and gentlemen of the jury what those
2 documents are and what, if anything, you had
3 to do with them.

4 A This is the 1981 Surgeon General's Report
5 that looked at the changing cigarette,
6 low-tar nicotine filtered cigarettes and the
7 disease consequences. I was the -- one of
8 the senior editors for that.

9 This is the 1983 Surgeon General's
10 Report on Cardiovascular Disease. I was
11 also a senior editor for that.

12 This is the 1980 report which was on
13 Health Consequences of Smoking for Women. I
14 was also the senior editor for that.

15 This is the 1986 Surgeon General's
16 Report on Involuntary Smoking. I was the
17 senior scientific editor, the editor
18 responsible for the overall content of that
19 volume.

20 This is the 1985 Surgeon General's
21 Report on Cancer and Chronic Lung Disease in
22 the Workplace. I was also the senior
23 scientific editor for that volume,
24 responsible for its overall content.

25 And this is the 1989 Surgeon General's
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1 Report, Reducing the Health Consequences of
2 Smoking, 25 Years of Progress. And I was a
3 senior reviewer for this one.

4 Q We mentioned the Koop/Kessler matter.

5 A Yes.

6 Q Would you identify it right now for the
7 record. Don't tell us what it's about, just
8 identify it.

9 A Yes. This is the final report of the
10 Advisory Committee on Tobacco Policy and
11 Public Health commonly referred to as the
12 Koop/Kessler Report.

13 Q That was issued when?

14 A July 1997.

15 Q You were a consultant to that?

16 A I was.

17 Q Now, Dr. Burns, briefly, in your opinion, as
18 a lung specialist and a cancer specialist,
19 what different diseases do direct smoking,
20 that is people who smoke cigarettes, a pack
21 or more a day for 25 or more years, what
22 diseases do cigarettes cause, in your
23 opinion?

24 A They cause cancer of the oral cavity, of the

25 larynx.

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- 1 Q What do you mean by the oral cavity?
2 A The mouth, the tongue, pharynx, the back of
3 the throat, the larynx, the voicebox, the
4 esophagus, the tube that you breathe in, the
5 lung, the pancreas, kidney, and urinary
6 bladder. They also cause conic obstructive
7 lung disease, which is a narrowing of the
8 airways which makes it difficult to breathe.
9 Cause heart disease and stroke. They cause
10 rupture or dilation of the major vessel of
11 the blood system called the aorta. That's
12 called an aortic aneurysm. And they cause
13 blockage of the vessels that go to your
14 extremities in your legs, that's referred to
15 as peripheral vascular disease.

- 16 Q Peripheral?
17 A Peripheral vascular disease. There are also
18 some special consequences for women. Women
19 who use oral contraceptives have an
20 increased risk of cerebral hemorrhage, also
21 increased risk of myocardial infarction in
22 those women.
23 Q What is myocardial infarction?
24 A The obstruction of the blood vessels that
25 supply the heart, commonly called a heart

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- 1 attack.
2 There is also consequences for the
3 fetus, the fetus is small, has a higher
4 mortality, both in utero and post-utero, and
5 there are complications of pregnancy for the
6 mother specifically related to the placenta.
7 Q That list, let me ask you now, with respect
8 to secondhand smoke or environmental tobacco
9 smoke, what's the official name of it now?
10 It's called passive smoking? What's it
11 called now?
12 A Well, the exposure is to environmental
13 tobacco smoke. And we refer to it either as
14 passive smoking or involuntary smoking. The
15 term that we use in the reports is
16 involuntary smoking.
17 Q If the jury were to hear the word secondhand
18 smoke, just a common parlance word, is there
19 any difference between that and involuntary
20 smoking?
21 A No, there isn't.
22 Q Doctor, to a reasonable degree of scientific
23 certainty, does exposure on the job,
24 occupational exposure, long-term
25 occupational exposure to secondhand smoke or

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- 1 environmental tobacco smoke cause lung
2 cancer in human beings?
3 A Absolutely.
4 Q And how do you know that?
5 A Well, there's a variety of ways that you
6 reach that causal judgment. Principally,

7 what you do is you assemble all of the
8 information that's available, scientific
9 now, I'm talking about, and organize that
10 information to see whether you can draw a
11 causal conclusion.

12 The first piece of that evidence is to
13 look at what happens with high-dose
14 exposure. Obviously, secondhand smoke
15 exposure is a lower-dose exposure than
16 active smoking, and so the first thing that
17 you would do, just as you would with
18 examining asbestos or anything else, would
19 be to examine what happens at high-dose
20 exposure, and specifically what you're
21 looking for there is whether there's a
22 threshold for effect. And if -- could I go
23 to the --

24 Q Yes, if you don't mind.

25 THE COURT: Go ahead, Doctor.

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1 Q Keep in mind everyone has a seat, this lady
2 has to take down what you say, so if you
3 could kind of draw sideways.

4 A I will try and do that.

5 One of the common things that we
6 examine when we're looking at a causal
7 relationship is whether or not there is a
8 relationship between the amount of the
9 exposure and the consequences. In this
10 case, we're looking at the risk of
11 developing lung cancer in relation to the
12 amount of exposure measured by the number of
13 cigarettes someone smokes per day.

14 We have on this side a risk --

15 Q Excuse me, Doctor. Let me do this because
16 your voice.

17 MR. MOTLEY: Your Honor, may I move
18 this closer?

19 MR. OHLEMAYER: I also suggest if
20 we proceeded by question and answer, it
21 might be --

22 THE COURT: He asked permission, in
23 addition, to show this to the jury. That's
24 all right. I'll allow the narrative at this
25 point.

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1 A If you take the most common number of
2 cigarettes that people smoke, one pack a
3 day, and put it here --

4 MR. MOTLEY: Judge, could I give
5 him this?

6 A That's 20 cigarettes.

7 Q Excuse me, Doctor, I don't want you to feel
8 like Phil Donahue or anything, but if I give
9 you this, I think it will amplify, okay?

10 A Does that help?

11 Then we can measure how much risk there
12 is. The way that we measure that is by
13 looking at the frequency with which people
14 die of lung cancer who smoked 20 cigarettes
15 per day, compared to people who never

16 smoked. So we're looking at a relative risk
17 or the ratio, the number of times that the
18 risk is compared to a nonsmoker. While some
19 studies vary, in general, we get a risk of
20 about 10.

21 If we look at people who smoke between
22 10 and 19 cigarettes, we get a risk, it's
23 down here about 7 or 8. If we look at
24 people who smoke less than 10 cigarettes, we
25 get a risk down here about 4.

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1 If you look at people who smoke two
2 packs a day, the risk is up here, 40
3 cigarettes per day, the risk is about 18 to
4 20. So what you can see -- and then the
5 risk in the people who never smoked is
6 defined as 1. So we have 1 here.

7 What we're looking for is whether
8 there's some level necessary to produce the
9 effect. We're looking for whether or not we
10 have a relationship that looks like this,
11 where it comes down and does that. So that
12 it looks like this, some level which you
13 don't see any lung cancer risk.

14 When you look at the actual data, and
15 this is data from multiple studies, millions
16 of people followed over many, many years,
17 you see that the line that comes down is not
18 too far off a straight line, and if anything
19 comes in on the positive side, suggesting
20 that there's absolutely no threshold
21 whatsoever.

22 Q What does that mean, no threshold?

23 A There's no safe level of cigarette smoke.
24 And that led us in the Public Health Service
25 to communicate to people that there's no

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1 safe level of smoking and there's no safe
2 cigarette. The dose response relationship
3 says that any level of active smoking
4 creates an increased risk of lung cancer.

5 Well, the next step in the process is
6 then to see whether the smoke that people
7 inhale to define these risks is similar to
8 the smoke that you inhale from the
9 environment. It makes kind of logical sense
10 that both of them are tobacco being burned
11 and they should contain the same substances.

12 When you actually look at them, you
13 find that the same compounds are present in
14 both. There's a little bit of a different
15 mix, and that difference in mix is largely
16 produced by a difference in the temperature
17 at which the tobacco is burned.

18 Q If someone were to light a cigarette and sit
19 it here on this table for about 15 seconds,
20 what would the tip be, temperature of the
21 tip?

22 A Oh, it varies some with a cigarette, but
23 it's about 500 degrees. And then it goes up
24 to about, anywhere from 6 to 900 degrees,

25 depending where you are when you inhale.

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1 Most of you are familiar with the fact that
2 when you see someone smoke and you draw
3 through the cigarette, you get a glowing
4 ember. What that glowing ember represents
5 is an increase in the temperature at which
6 the tobacco is being burned.

7 Q What's the highest temperature it gets?

8 A I think it gets 900 to 1000 degrees.

9 MR. OHLEMAYER: I object to lack of
10 foundation.

11 THE COURT: Overruled on that
12 count. You can answer, Doctor.

13 A And the difference then is that --

14 Q Did you answer the question? I don't know
15 if the jury heard you.

16 THE COURT: The question was what
17 is the highest temperature.

18 A 900 to about a thousand degrees, mainstream
19 smoke.

20 The smoke then is defined
21 scientifically under two parts. One is --

22 Q Can you draw that, by any chance?

23 A One is mainstream.

24 Q On the next sheet.

25 A I'm not sure what you're asking me to do.

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1 Q Can you just show the vapor,
2 mainstream/sidestream? Just kind of draw a
3 cigarette.

4 A You have a cigarette, it's lit. You have
5 smoke that curls up from the tip of the
6 cigarette, and then you have the smoke that
7 the smoker inhales, which comes, is drawn
8 through the cigarette.

9 When you scientifically examine those
10 two, you can actually measure the chemical
11 compounds present in this smoke, compare
12 them to the chemical compounds present here.

13 Q Do they have names, the vapors?

14 A There's a wide variety.

15 Q I'm just talking about the smoke you've
16 drawn there, is that mainstream? Is that
17 what --

18 A This is mainstream smoke here. And this
19 smoke, the smoke that curls up from the tip,
20 is called sidestream smoke. What we find
21 when we compare those two is that both kinds
22 of smoke have essentially the same chemicals
23 in them. But the distribution, the relative
24 concentrations are different. When you burn
25 the smoke at a higher temperature, you get

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1 more complete combustion of the smoke. When
2 you burn it at a lower temperature, you
3 actually produce more of some of the toxic
4 and carcinogenic substances that are present
5 in cigarette smoking. But for all intents
6 and purposes, when you look at this

7 scientifically, most of the toxic and
8 carcinogenic substances that are present in
9 mainstream smoke are also found in
10 sidestream smoke.

11 So we now have a second piece to this
12 causal trail. We know that mainstream smoke
13 causes lung cancer; we know that there's no
14 safe level of that exposure; and we know
15 that sidestream smoke contains the same
16 components.

17 So the next step is to find out how
18 much exposure do you get.

19 Q Does who get?

20 A The people who are nonsmokers in an
21 environment where tobacco is being smoked.

22 What was done was to go and measure a
23 variety of these compounds in many different
24 circumstances. Offices, bars, restaurants,
25 homes, all kinds of -- automobiles. All

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1 kinds of different places.

2 And when you look at how much is
3 present in the air, and you go back and put
4 it on that dose-response relationship, there
5 is enough of a dose that you would expect a
6 small increased risk.

7 The next step is to see whether people
8 in that environment actually absorb that
9 smoke.

10 Q What do you mean by that?

11 A Well, the smoke in the air obviously doesn't
12 hurt you. In order for it to hurt you, you
13 have to inhale it, have it be deposited in
14 your airways, absorbed into your body. So
15 the next step in the causal trail is to
16 demonstrate how much of that happens.

17 Nicotine is essentially only contained
18 in tobacco. And so it becomes a very good
19 measure of the amount of exposure to tobacco
20 smoke that an individual has either as a
21 mainstream smoker or as an involuntary and
22 passive smoker may be exposed through
23 sidestream smoke.

24 When you look at nicotine, the easiest
25 way to do that is to look at one of its

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1 metabolites, because that stays around for a
2 longer period of time.

3 Q That's a word that the jury, I don't
4 believe, heard today, at least in the trial.
5 What does metabolites mean?

6 A Nicotine, when it's taken into the body, is
7 changed by some of the enzymes in the body,
8 some of the processes by which we digest
9 small compounds in the body. And it's
10 changed into other compounds that are easier
11 to excrete or have less direct effect than
12 nicotine. So one of those is cotinine.

13 Q Would you spell that for us?

14 A C-O-T-I-N-E.

15 Q Sure.

16 A I don't think that's right.
17 Q Where did you say you went to medical
18 school?
19 A Well, one of the comments in my medical
20 school review was that I can't spell.
21 Q C-O-T-I-N-I-N-E.
22 A The cotinine can be measured in saliva, in
23 urine, or in blood, if it's readily
24 available, and you can easily measure it in
25 large numbers of people.

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1 When you measure the amount of cotinine
2 in people who are in environments where
3 there's secondhand smoke, and compare that
4 to the cotinine that's present in smokers,
5 again, you find enough cotinine present that
6 you would expect a risk. That step in the
7 causal chain has been sufficient for us to
8 define risks for low-dose exposure to
9 asbestos and a variety of other agents and
10 to regulate them.

11 However, with secondhand smoke, you can
12 take it an additional step further. We
13 actually have human studies, human
14 epidemiology. Epidemiology is the study of
15 populations of people and the disease
16 occurrence in those populations. And we
17 looked at the effect of secondhand smoke
18 exposure. To look at that, we need to be
19 able to see a difference in the amount of
20 exposure. All of us have had some exposure
21 to secondhand smoke. And in order to do an
22 epidemiologic study, a study of two
23 populations to look at differences in risk,
24 those two populations have to have different
25 amounts of smoke that they've been exposed

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1 to. And that's a fairly complicated thing
2 to do with an exposure like environmental
3 tobacco smoke.

4 The simplest way to do that was to look
5 at spouses whose husbands smoked, nonsmoking
6 wives of smoking husbands, compared to
7 nonsmoking wives of husbands who didn't
8 smoke. There both sets of wives would be
9 expected to have the environmental tobacco
10 smoke exposure that occurs in the general
11 population.

12 Q Just walking around?
13 A Just walking around, going to restaurants,
14 working in offices, all of the other ways
15 that we get exposed to smoke, but it would
16 be expected because their husbands smoke
17 that they'd have more than wives of
18 nonsmoking husbands. And actually when you
19 look at the cotinine in the urine of those
20 individuals, you do find that they do have
21 more, when those studies are done, and
22 there's now been almost 40 of them.
23 Q 40?
24 A 40. You see an increased risk, small,

25 consistent with dose, an increased risk of
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1 lung cancer. So you have unequivocal
2 evidence that high-dose exposure is a cause
3 of lung cancer; we know that the agent
4 contains the same toxins and carcinogenic
5 substances; we know that the amount present
6 in the air is enough to expect a risk; we
7 know that the amount that people absorb from
8 that air is enough to expect a risk. And
9 when you look at people with different
10 levels of exposure, you actually find this.
11 So there simply isn't any longer any
12 scientific fact that this exposure can't
13 cause lung cancer.

14 Q Thank you, Doctor. Could you return. I'll
15 take your microphone for you.

16 MR. MOTLEY: Judge, were you
17 intending to take an afternoon break?

18 THE COURT: I think we may do that
19 now, Doctor. You can step down. We'll take
20 a ten-minute break, ladies and gentlemen.

21 (Standard admonition)

22 MR. CASSELL: All rise.

23 (A brief recess was taken.)

24 MR. CASSELL: All rise.

25 (Jury not present)

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1 THE COURT: Be seated. Thank you.
2 Jury is not present. Matter to come to the
3 Court's attention?

4 MR. OHLEMAYER: Your Honor, my
5 partner, David Hardy, is here in town. He's
6 in the courtroom watching the trial. And
7 this afternoon, Mr. Motley -- I should say.
8 Mr. Young served a subpoena.

9 MR. CROSS: I can't hear a word
10 he's saying.

11 THE WITNESS: Your Honor, should I
12 be here for this?

13 THE COURT: You're okay.

14 MR. OHLEMAYER: I think, Your
15 Honor, you ought to quash this, sanction
16 these guys. I think we ought to stop this
17 game where every lawyer that comes in the
18 courtroom gets a subpoena. This is
19 ridiculous, Your Honor.

20 THE COURT: I saw that was filed
21 with the court reporter. Did you file it?

22 MR. RILEY: I did not file it, Your
23 Honor.

24 THE COURT: Who served the
25 subpoena?

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1 MR. JOSEPH YOUNG: I did, Your
2 Honor.

3 THE COURT: Counselor, come up.
4 What's the purpose of the subpoena on
5 Mr. Ohlemeyer's partner here?

6 MR. JOSEPH YOUNG: The purpose, I

7 believe, Your Honor, is to authenticate
8 documents that were discussed earlier in the
9 day that have some foundational information
10 for Mr. Hardy to authenticate documents.
11 That's my understanding.

12 THE COURT: Your understanding?

13 MR. JOSEPH YOUNG: I was just asked
14 to serve the subpoena, Your Honor. I wasn't
15 in the courtroom at the time the discussions
16 concerning the documents took place.

17 MR. RILEY: There's probably no
18 better individual, Your Honor, in this
19 courtroom than Mr. Hardy to be able to
20 authenticate these documents and thereby
21 vitiating the problems that we've been
22 having with regard to what Mr. Motley was
23 arguing about.

24 MR. OHLEMAYER: The problem these
25 lawyers have, Your Honor, is they spent four

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1 years conducting discovery, they could have
2 subpoenaed the Tobacco Institute, they could
3 have taken depositions, they could have
4 done -- you can't subpoena lawyers in the
5 middle of a trial to authenticate documents.
6 I really think the Court ought to --

7 THE COURT: Is there a motion?

8 MR. OHLEMAYER: I move to quash the
9 subpoena. I move -- I would ask the Court,
10 as a sanction, to admonish or to suggest to
11 opposing counsel that they not continue this
12 practice and bring these matters to the
13 Court's attention before they start serving
14 subpoenas.

15 THE COURT: Mr. Cross, care to be
16 heard on the motion to quash?

17 MR. CROSS: I have nothing further.
18 THE COURT: Motion to quash is
19 sustained, and I would make that suggestion
20 to counsel.

21 MR. OHLEMAYER: Thank you.

22 THE COURT: I might tell you,
23 another matter. As we know, we are dealing
24 with a jury that has matters to attend to
25 themselves and we've been accommodating in

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1 that matter, but there's been a request -- I
2 know we talked about this last evening,
3 Mr. Ohlemeyer, as to how long we were going
4 to go tomorrow afternoon. Jury has
5 indicated to the bailiff, apparently, that
6 4:00 would be their hope. So I just tell
7 you that in light of witness planning and
8 that type of thing. So we'll go to
9 approximately 4:00 tomorrow, especially
10 since it's a Friday, I realize they have
11 matters to attend to in their lives.

12 While we're all here and the jury is
13 not here, apparently last, several days ago,
14 Thursday or Friday, it was brought to my
15 attention that there was an effort to take a

16 photograph in the courtroom. Is that
17 correct? Anybody know anything about that,
18 from the plaintiffs' side?

19 MR. CROSS: No.

20 MR. JOSEPH YOUNG: Your Honor, the
21 request was made to the bailiff, and the
22 bailiff indicated that that was
23 inappropriate and no photograph was taken.

24 THE COURT: All right. As we all
25 know what the rule says, during sessions of

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1 court, or recesses between sessions, and I
2 would consider the evening to be a recess
3 between sessions, there will be no
4 photograph taken in this courtroom. And
5 this is the courtroom.

6 Any other matter we need to attend to
7 outside the presence, Mr. Ohlemeyer?

8 MR. OHLEMAYER: Not here, Your
9 Honor.

10 THE COURT: Mr. Motley?

11 MR. MOTLEY: No.

12 THE COURT: Mr. Cross?

13 MR. CROSS: No.

14 THE COURT: Bring in the jury.

15 (Jury present)

16 MR. CASSELL: All rise.

17 THE COURT: Be seated. Jury back
18 in its entirety together with the
19 alternates. Would you again state your
20 name, sir.

21 THE WITNESS: David Michael Burns.

22 THE COURT: And you recognize
23 you're still under oath; sir.

24 THE WITNESS: I do.

25 THE COURT: Continue, Mr. Motley.

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1 DIRECT EXAMINATION (cont.)

2 BY MR. MOTLEY:

3 Q Doctor, again, try to talk as loud as you
4 can. I just want to make sure you were
5 clear when you were down here. One of my
6 colleagues said he didn't hear, I want to
7 make sure the lady heard you, the ladies and
8 gentlemen and the Court.

9 Did you say with respect to ETS -- and
10 can I shorten lung cancer with LCA?

11 A Yes.

12 Q There were, you studied 40 people or 40
13 populations?

14 A No, there were 40 populations.

15 Q Okay. So more than 40 people.

16 A There were 40 individual publications,
17 scientific publications that examined
18 individual populations.

19 Q And when they do studies like that,
20 epidemiological studies like that, they
21 study just a handful of people or lots of
22 people or you describe it.

23 A Well, it varies. Most of the studies
24 examined patients who had lung cancer who

25 were nonsmokers, and they selected a control
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1 group from the hospital or the community,
2 and looked at the frequency with which they
3 were exposed to environmental tobacco smoke.
4 Many of those studies varied from several
5 hundred people to several thousand people.

6 There were also studies that examined
7 populations looking forward in time,
8 particularly one in Japan, that was a large
9 population study of several hundred thousand
10 people who were followed for multiple years,
11 and there they looked at the frequency with
12 which lung cancer occurred in wives of
13 nonsmoking husbands as opposed to wives of
14 smoking husbands.

15 Q Did I hear you say several hundred thousand?
16 A Yes, that's correct.

17 Q Okay. Now, Doctor, have you ever been asked
18 by any government agencies to offer your
19 expertise on whether or not ETS, or
20 secondhand smoke, causes disease in human
21 beings?

22 A Yes, I've been asked by a variety of
23 agencies, including the local governments in
24 San Diego, the county and city governments,
25 as well as the state of California's

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1 Environmental Protection Agency.

2 Q All right. Now, you indicated that you were
3 involved with the U.S. Environmental
4 Protection Agency report of January 1993 on
5 secondhand smoke. Do you recall that?

6 A That's correct. This document right here.

7 Q Dr. Burns, what is a class A carcinogen?

8 A Carcinogens are classed into various groups
9 based on the strength of the evidence. And
10 group A carcinogen is called proven, that
11 is, it's a proven carcinogen, and it's a
12 proven carcinogen in humans, so it's
13 referred to as a proven human carcinogen.

14 Q Was the conclusion of the Environmental
15 Protection Agency in 1993 what I've written
16 on the board or did they reach some other
17 conclusion?

18 A No. The conclusion of the report and the
19 unanimous conclusion of the science advisory
20 board was that the environmental tobacco
21 smoke was a proven human carcinogen.

22 Q Did I write that right?

23 A With the exception that it's group A, not
24 class A. But yes, you wrote it right.

25 Q Picky, picky. Group A.

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1 A Group A.

2 Q All right. Now, 1993 has been five years
3 ago.

4 A That's right.

5 Q Since the EPA wrote the report of 1993, has
6 the evidence about environmental tobacco

7 smoke causing cancer in humans gotten more
8 strong or less strong or stayed the same?
9 A The data has increased, and the number of
10 groups who have reviewed it has increased.
11 The conclusion has remained the same. The
12 data that supports it is now even stronger.
13 Q In that regard, Doctor, let me move this out
14 of the way a moment. Ask you, do you see
15 your screen right there?
16 A I do. This terminal?
17 Q Correct. I'm going to show you these
18 different organizations, and I think the
19 jury will be able to see them, then you tell
20 me whether or not these organizations have
21 studied environmental tobacco smoke and
22 whether they've concluded whether it causes
23 or doesn't cause lung cancer, okay?
24 A Yes.
25 Q Show the first one, please.

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1 A Yes.
2 Q 1986 Surgeon General's Report.
3 A That was the report that I was the senior
4 scientific editor for, and yes, we concluded
5 it was a cause of human lung cancer.
6 Q Has any Surgeon General's Report concluded
7 otherwise since then?
8 A No.
9 Q Next one, please. The National Research
10 Council. First, what is that?
11 A The National Research Council is part of the
12 National Academy of Sciences, which is the
13 group that represents the scientific
14 community in the United States. They are
15 frequently asked by a variety of
16 governmental entities to review and form an
17 opinion on issues of science. They were
18 asked about the same time as the Surgeon
19 General's Report was done to review all of
20 the evidence on environmental tobacco smoke
21 and reach a conclusion as to whether it
22 caused disease or not. They did that, and
23 they concluded it was a cause of lung
24 cancer.
25 MR. FURR: Objection, this is

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1 hearsay now.
2 MR. MOTLEY: This is not hearsay.
3 He's an expert. He can base his opinion on
4 out-of-court statements of other parties.
5 THE COURT: Overruled.
6 Q Next one, please. I think it's obvious, but
7 for the record what's the National Institute
8 of Occupational Safety and Health?
9 A That's the scientific arm for the review of
10 scientific information and conduct of
11 research on occupational illnesses and
12 agents in the workplace that cause illness
13 and disease. They reviewed the evidence and
14 they also concluded that environmental
15 tobacco smoke was a cause of lung cancer.

16 Q Isn't it a given, Doctor, when you and I,
17 when we discuss environmental tobacco smoke,
18 I'm using secondhand smoke, passive smoke,
19 all the same term?
20 A They all mean the same thing.
21 Q Okay. And in your professional opinion, has
22 NIOSH reached a conclusion that ETS causes
23 lung cancer?
24 A Yes.
25 Q The next one, please. Just for the record,
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1 I think everyone knows what the American
2 Medical Association is, but would you
3 describe it for the jury.
4 A The American Medical Association is the
5 national organization of physicians of the
6 United States.
7 Q And approximately how many doctors belong to
8 that?
9 A I can't give you an accurate count. My
10 understanding is it's several hundred
11 thousand.
12 Q And has the journal -- excuse me. Has the
13 American Medical Association gone on record
14 as to whether or not cigarette smoking,
15 secondhand cigarette smoking causes cancer
16 in humans?
17 A Yes, they have.
18 Q The next one, please. You've already told
19 us about that. That would be correct to put
20 a checkmark there; correct?
21 A Absolutely.
22 Q The next one, please. What is the American
23 Thoracic Society?
24 A The American Thoracic Society is the
25 professional organization of pulmonary
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1 physicians in the United States. And it has
2 a variety of groups that examine specific
3 topics and form what are called position
4 papers or scientific papers on those topics.
5 They have also concluded that secondhand
6 smoke causes lung cancer.
7 Q Next one, please. The California
8 Environmental Protection Agency, Office of
9 Environmental Health Hazard Assessments, you
10 had something to do with that, didn't you?
11 A I helped them in the early stages of that
12 process and attended one of the meetings
13 that they held to review the information.
14 They have completed an update of the science
15 on this, I believe last year, and they also
16 concluded, after reviewing all of the new
17 studies, that secondhand smoke caused lung
18 cancer.
19 Q And I believe I have a copy of that here.
20 Could you tell me if this is what you're
21 referring to?
22 A Yes. This is the copy of that report, it
23 reviewed all of the scientific studies in
24 detail.

25 Q The next one, please.

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1 A American Cancer Society.

2 Q Again, for the record, I believe you already
3 said what that is, didn't you?

4 A It is the voluntary health organization in
5 the United States that is interested in the
6 treatment, prevention, and cure of cancer.

7 Q All right.

8 A They've also concluded that secondhand smoke
9 causes lung cancer.

10 Q When you say they've concluded this, this
11 isn't some poll or survey you've done, is
12 it?

13 A No, this is completely independent of my
14 input.

15 Q And they've -- have they published reports
16 and opinions and things like that?

17 A They have issued a formal position on this,
18 yes.

19 Q Next one, please. Now, American Lung
20 Association, for the record, what is that?

21 A That's the voluntary health agency that is
22 interested in the prevention, treatment, and
23 diagnosis of lung disease in the United
24 States.

25 Q Is that the Christmas Seal people?

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1 A That's correct.

2 Q And have they issued a formal opinion or
3 report on environmental tobacco smoke and
4 lung cancer?

5 A Yes, they also have an opinion that
6 secondhand smoke is a cause of lung cancer.

7 Q Next, please. The American College of
8 Occupational and Environmental Medicine,
9 what is that, sir?

10 A That's the professional organization of
11 individuals who are interested in
12 occupational health.

13 Q And that's an organization of doctors?

14 A Doctors and other scientific individuals.

15 Q And have they issued a report or opinion
16 with respect to environmental tobacco smoke
17 and lung cancer?

18 A Yes, they have.

19 Q And is that checkmark in the correct column?

20 A It is.

21 Q Next, please.

22 What is the American Industrial Hygiene
23 Association?

24 A That's the organization of the individuals
25 who are industrial hygienists. Those are

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1 people who go into workplaces to look at and
2 measure the amount of contaminants that the
3 workplace -- to solve problems that
4 employers are having and to assess the
5 hazards in a given workplaces.

6 Q Have they issued an opinion or report as

7 I've demonstrated on this chart?
8 A Yes.
9 Q Next one, please.
10 The National Cancer Institute, you have
11 already described for the jury. Have they
12 issued an official opinion or report on
13 environmental tobacco smoke and lung cancer?
14 A Yes. They also have concluded that
15 secondhand smoke causes lung cancer.
16 Q Next one, please.
17 Consumer Product Safety Commission.
18 You told the jury what that organization is.
19 Have they reached a conclusion with respect
20 to secondhand smoke or environmental tobacco
21 smoke and lung cancer?
22 A Yes, they have.
23 Q And is that accurately depicted on that
24 chart?
25 A I believe it is, yes.

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1 Q Next, please.
2 The American Heart Association, and I
3 think there's a date up there, 1997. Just
4 for the record, what is the American Heart
5 Association?
6 A American Heart Association is the voluntary
7 health agency that is interested in the
8 diagnosis, treatment, and management of
9 heart disease in the United States.
10 Q And the next one, please.
11 The National Association of County and
12 City Health Officials; what is that?
13 A That's the national organization of those
14 groups that represent your city and
15 council -- city and county employees on a
16 professional level. That's their
17 professional organization, and they
18 represent people who are county
19 administrators, et cetera.
20 Q And have they reached a similar conclusion
21 as depicted on this chart?
22 A Yes.
23 Q Next one, please.
24 The American Academy of Pediatrics
25 Committee on Environmental Health. That's

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1 an organization of doctors that deal with
2 children, pediatrics?
3 A That's right.
4 Q And they have a committee on environmental
5 health?
6 A Yes.
7 Q Have they reached the conclusion depicted on
8 that chart?
9 A They have.
10 Q All right. The Advisory Committee on
11 Tobacco Policy and Health, is that the
12 Koop/Kessler committee?
13 A Yes. Yes, it is.
14 Q Have they reached a similar conclusion?
15 A They have.

16 Q Now, what about the American Cigarette
17 Industry; do you know whether they've
18 reached a conclusion on this?
19 A They believe that the evidence is not
20 sufficient to conclude that environmental
21 tobacco smoke causes lung cancer.
22 Q Can you show that, please. So we've checked
23 that correctly?
24 A That's correct.

25 MR. MOTLEY: I'd like to mark that
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1 chart.

2 MR. OHLEMEYER: Can I get a copy of
3 it, please?

4 MR. MOTLEY: I'll have to make you
5 one. I actually have one.

6 MR. OHLEMEYER: Thank you.

7 MR. MOTLEY: May I approach, Your
8 Honor?

9 THE COURT: Yes. Thank you.

10 Q Dr. Burns, I'm going to hand you a copy and
11 ask you if that's a copy of what we just
12 demonstrated to the jury.

13 A Yes, it is.

14 MR. MOTLEY: I just want to mark it
15 for ID for the record, please. I marked it
16 as No. 44, Mr. Cassell.

17 MR. CASSELL: I believe it would be
18 25, sir.

19 MR. MOTLEY: No. That's right.
20 All right.

21 Q Now, Dr. Burns, let me go back to the EPA
22 report that we have been discussing, if I
23 might. Can everyone --

24 MR. MOTLEY: Can Your Honor inquire
25 if the jury can hear okay?

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1 THE COURT: They can.

2 Q When the EPA, for that matter, any
3 government agency --

4 MR. MOTLEY: May I stand here, Your
5 Honor?

6 THE COURT: Go ahead.

7 Q -- investigates a health matter, okay, do
8 they take evidence, maybe not like this in a
9 courtroom, but do they gather up information
10 from different sources?

11 A Not every agency does, but the EPA, through
12 its process, has open hearings where it
13 notices the hearings; that is, sends out the
14 notice that they're going to have this
15 meeting to all of the interested parties,
16 and then takes evidence from those
17 interested parties as part of the process by
18 which they reach a judgment.

19 Q Okay. And in this instance, you
20 participated in this process?

21 A I did.

22 Q Did the EPA take evidence, that is, have
23 people come in and express their opinions in
24 regard to their investigation of secondhand

1 A Yes, there was an extensive set of
2 presentations.
3 Q Are you familiar with an organization called
4 HBI, or Healthy Buildings International?
5 A Yes, I am.
6 Q And how are you familiar with them, sir?
7 A They were one of the organizations that
8 presented at the EPA hearing on the -- I
9 believe they presented evidence on the
10 magnitude of the problem in work
11 environments, the measurements of the
12 environmental tobacco smoke in the work
13 environments. And my recollection is that
14 the data showed that --

15 MR. OHLEMAYER: Objection, Your
16 Honor. Calls for hearsay.

17 THE COURT: I think he's answered
18 the question.

19 Q I'll come back to them in a little bit,
20 about what the data shows.

21 A That's fine.

22 Q Generally, to your knowledge, did the
23 cigarette, American cigarette manufacturers,
24 have an opportunity to be heard with respect
25 to the EPA?

1 A Oh, yes. They were extensively represented
2 and, again, my recollection is they had
3 approximately half of the time allotted to
4 public presentations.

5 Q Now, sir, with respect to the Healthy
6 Buildings International, do you have any
7 personal knowledge about whether that
8 organization has any connection with the
9 American cigarette manufacturers?

10 A It is my understanding that it is heavily
11 sponsored by the American cigarette
12 companies.

13 Q Doctor, I want to go back now to hospitals,
14 okay? Have you ever worked at a VA
15 hospital?

16 A Yes. Both in my medical school years and
17 also during the period of time that I was at
18 UCSD. We have a two-hospital now,
19 three-hospital system at UCSD. One of them
20 is a Veteran's Administration hospital, and
21 that's where I was based in the early part
22 of my career.

23 Q So beginning what year would you have some
24 VA hospital experience? Some work
25 experience, I'm talking about.

1 A Well, I worked in Boston as a medical
2 student.

3 Q Year?

4 A That would be 1972.

5 Q Okay.

6 A I was a lecturer at Emory and taught

7 physical diagnosis.
8 Q That's in Atlanta?
9 A It's in Atlanta. Emory University, during
10 the time I was at CDC.
11 Q And that was year?
12 A And that was 1974 through 1976.
13 Q Okay.
14 A And I taught physical diagnosis at the
15 Veteran's Hospital there. And then I was a
16 fellow at UCSD and spent half of our
17 clinical time at the Veteran's Hospital from
18 1976 through '79. I was based at the VA
19 Hospital 1979 and '80 and still am
20 periodically out at the Veteran's Hospital
21 as part of my teaching responsibilities.
22 Q So from 1980 on it's been less, but you
23 still have some involvement?
24 A Yes. We have a program that is based in
25 both hospitals, and so it's not uncommon for

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1 us to be in both institutions.
2 Q All right, sir. In Boston, in 1972, you
3 were in medical school, but what did you do
4 at the VA Hospital? I don't mean give us
5 everything you did.
6 A I took a cardiology rotation for one month.
7 Q The heart patients?
8 A That's right.
9 Q And in Atlanta from 1974 to 1976 what did
10 you do?
11 A I taught physical diagnosis, which is to
12 teach medical students how to examine
13 patients and take a medical history.
14 Q Did you go on that ward, those wards?
15 A Oh, yes. You actually go with the student
16 to examine the patient.
17 Q At UCSD from 1976 to present, have you
18 physically been out on the wards?
19 A Sure.
20 Q I want you -- you have looked at the case of
21 Mildred Wiley, have you not?
22 A I have.
23 Q I want you to just assume for a second that
24 she died in June of 1991. You know that
25 yourself from the death certificate.

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1 A I do, yes.
2 Q Restricting yourself to those 19 years, sir,
3 can you tell the ladies and gentlemen of the
4 jury and the Court whether or not in your
5 personal experience and observation you
6 observed veterans smoking in hospitals that
7 you had personal experience at?
8 MR. OHLEMAYER: Objection, Your
9 Honor, relevance; beyond the scope of this
10 witness' testimony.
11 MR. MOTLEY: Your Honor, it's
12 not -- I'm sorry.
13 THE COURT: Go ahead.
14 MR. MOTLEY: I was just going to
15 say, it certainly is relevant. I'm laying a

16 predicate and foundation for some testimony
17 I'm going to ask him, and his personal
18 experience is certainly relevant.

19 MR. OHLEMAYER: May we approach
20 briefly on that?

21 THE COURT: Let me see the
22 document.

23 Last objection is overruled. You may
24 continue, Mr. Motley.

25 MR. MOTLEY: Thank you, Your Honor.

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1 Q First your observations as a physician or a
2 physician in training. Did you observe
3 veterans smoking in Veteran's hospitals?

4 A Oh, yes. It was very common practice. In
5 general, veterans smoked more heavily than
6 the general population.

7 MR. OHLEMAYER: Objection.

8 MR. MOTLEY: I didn't ask you that
9 yet.

10 THE COURT: The last as to veterans
11 will go out. It's not responsive.

12 Q You did observe veterans smoking?

13 A Yes.

14 Q In your experience, and in your education
15 and training, do veterans smoke more often
16 or less often than members of the
17 non-veteran general population?

18 MR. OHLEMAYER: Same objection,
19 Your Honor.

20 THE COURT: Objection is noted and
21 overruled.

22 You may answer, Doctor.

23 A They smoke more commonly than the general
24 population, particularly the general
25 hospital population.

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1 Q By a magnitude of two or what? Give us a
2 reference here.

3 A It's about half again as much as the general
4 population.

5 Q Half again more?

6 A Half again more.

7 Q Now, Doctor, are you familiar with something
8 called the accreditation, I guess it's
9 accreditation. How do you pronounce that?

10 A Accreditation.

11 Q Accreditation manual for hospitals
12 promulgated by the Joint Commission on
13 Accreditation for Hospitals?

14 A Yes, I am.

15 Q Are you familiar with -- well, what do they
16 do? What's their purpose?

17 A Their purpose is to review and accredit
18 hospitals and all patient environments for
19 the compliance with the standards that they
20 set. It's intended to maintain the quality
21 of those institutions relative to the
22 standards that they have.

23 Q Have you ever had experience with -- can I
24 call it the JCAH?

25 A Yes, you can. JCAHO is the current.
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1 Q Have you had experience with them?
2 A I have. As medical director of respiratory
3 care, I'm responsible for the standards that
4 apply to the respiratory care department,
5 and therefore I do have a substantial
6 interaction with that group and am familiar
7 with the process.

8 Q Are you then personally familiar by
9 education, training, and experience with the
10 JCAH manuals and requirements for hospitals?

11 A Yes.

12 Q Can you tell me, sir, prior to 1991, were
13 there any such regulations by the Joint
14 Commission on Accreditation for Hospitals,
15 prior to 1991, with respect to environmental
16 tobacco smoke with respect to the amount of
17 smoke permitted?

18 MR. OHLEMAYER: Objection, Your
19 Honor. Lack of foundation, beyond the scope
20 of the witness' previous disclosure.

21 THE COURT: Overruled. You may
22 answer.

23 A Prior to that time, there was no JCAH
24 standard for environmental tobacco smoke
25 exposure.

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1 Q Were those accreditation manuals that you
2 mentioned standard policy for hospitals
3 across the United States from, say, 1972 to
4 1991?

5 A Yes, they were.

6 Q Were there any standards, sir, like by the
7 JCA, you say, HO now?

8 A Uh-huh. Yes.

9 Q Were there any standards that said you were
10 in violation of your accreditation if there
11 was four cigarettes being smoked in one room
12 or anything like that?

13 A No. There were -- the standard is a measure
14 that they use to evaluate the institution.
15 And there was no measure that said this is
16 the number of cigarettes that are allowed to
17 be smoked.

18 Q Doctor, would you define for the record that
19 word.

20 A Synergism is a term that is applied when you
21 get more of an effect than you would expect
22 from the sum of the two independent effects.
23 So if you get a certain amount of risk, say,
24 from cigarette smoking, if you get a risk of
25 ten from cigarette smoking, and say

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1 asbestos, you get a risk of five from
2 asbestos exposure; if you add those two
3 exposures together, you would expect the
4 risk of 15.

5 If you get a risk much higher than
6 that, then the combined exposure produces

7 more disease than the sum of the independent
8 exposures. And we call that synergism, or
9 synergy, depending on how you want to use
10 the term.

11 And in actual fact, the numbers for
12 asbestos show 50. So you have a risk of 50
13 with a combined exposure, whereas the sum of
14 the two independent exposures would give you
15 a risk of 15. So it's much higher than you
16 would expect just from adding the two
17 together.

18 What it implies --

19 MR. OHLEMAYER: Excuse me, Your
20 Honor.

21 THE COURT: I think you answered
22 the question, Doctor.

23 MR. MOTLEY: I'm sorry, I was
24 trying to find out if we had a book here.

25 Q Did the Surgeon General of the United States
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1 study this at a given point in time?

2 A It's been studied in several of the reports.
3 The most detailed discussion of it was in
4 this one, which is Cancer and Chronic Lung
5 Disease in the Workplace.

6 Q I thought it was up here. That's what I was
7 trying to find. This is 1985. Did you have
8 anything to do with this?

9 A Yes, I was the senior scientific editor for
10 that volume, and I also authored the chapter
11 on asbestos and played a substantive
12 authoring role in several other chapters.

13 Q So you have expertise on asbestos and
14 cigarettes working together?

15 A I do.

16 Q All right. Doctor, is there something
17 called asbestosis?

18 A Yes, there is.

19 Q That's asbestos with an I-S on it; correct?

20 A That's right.

21 Q Define asbestosis for the jury, if you don't
22 mind.

23 A Asbestosis is a process by which the lung is
24 scarred following sustained inhalation of
25 asbestos fibers. Asbestos is a dust that

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1 has a long thin fiber. You inhale it into
2 the lung and it sticks in the lung. And
3 after a prolonged inhalation, after a
4 sustained amount of inhalation, when you get
5 enough for a long enough period of time, it
6 causes scarring of the lung and it's a
7 particularly distinctive type of scarring.

8 Q Now, in fact, Doctor, the first time you and
9 I ever met was in a courtroom where you were
10 testifying against me, against my client;
11 isn't that right?

12 A I believe that's true.

13 Q Okay. And you looked at Mildred Wiley's
14 case, did you not, for us?

15 A I did.

16 Q For the family?
17 A Yes.
18 Q And can you tell the ladies and gentlemen of
19 the jury whether Mildred Wiley had in her
20 lungs scars caused by asbestos -- scars
21 caused by asbestos such as it would be
22 called asbestosis?
23 A No. She had no evidence of asbestosis in
24 her lung. There was no evidence of asbestos
25 bodies. The microscope -- you look under a
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1 microscope, and you can see these residuals
2 of asbestos. None of those were present and
3 there was no scarring consistent with
4 asbestosis.

5 Q So, Doctor, did you see -- you looked at the
6 x-rays and other things in this case?
7 A I just looked at the reports, not at the
8 x-rays myself.

9 Q Did you see any reports that would indicate
10 there was any asbestos scars in this lady's
11 lung?

12 A No, neither the x-ray reports nor the
13 autopsy described any scarring in her lung
14 consistent with asbestosis.

15 Q In addition, Doctor, to --

16 MR. MOTLEY: Your Honor, you've
17 already admitted this document. There's a
18 limiting instruction. May I hand it to Your
19 Honor?

20 THE COURT: All right.

21 MR. OHLEMAYER: Your Honor, again,
22 I object to any use or the eliciting of any
23 opinions from this witness on these
24 documents, because they're not the subject
25 of his previously disclosed testimony.

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1 MR. MOTLEY: Your Honor, they
2 certainly are. We disclosed -- we already
3 argued this one.

4 THE COURT: What document do you
5 have?

6 MR. MOTLEY: I'm sorry, sir. We
7 argued this once.

8 THE COURT: These are both
9 admitted.

10 MR. MOTLEY: Yes.

11 THE COURT: 9645. Go ahead,
12 Counselor. Objection is overruled.

13 MR. MOTLEY: May I have Mr. Cassell
14 give these to the jury, Your Honor?

15 THE COURT: All right.

16 Q Doctor, did I give you a copy?

17 A No.

18 Q Doctor, you notice this is dated March the
19 7th, 1968?

20 A Yes, that's correct.

21 Q And actually held this meeting in Hilton
22 Head. You know where that is, don't you?

23 A I do. I've never been fortunate enough to
24 visit there. I do know where it's at. It's

25 in North Carolina.

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1 Q No, it's not. South Carolina.

2 A South Carolina? I don't know where it is
3 then. Sorry about that.

4 Q Everybody gives North Carolina credit.

5 MR. FURR: We wish it was there.

6 MR. MOTLEY: I imagine you wish I
7 was there.

8 Q Now, Doctor, this was -- I ask you to assume
9 that Dr. Wakeham was the medical -- excuse
10 me, was the head of R & D for Philip Morris;
11 okay?

12 A I know that independently.

13 Q You know that independently.

14 Look on the first page, please. It
15 says, "When the smoking and health question
16 became critical in the 1950s, the tobacco
17 industry took two steps to meet the
18 situation.

19 "First, it adopted the, quote, vigorous
20 denial approach, the statistical evidence is
21 biased, nothing is proven, animal
22 experiments don't tell us what happens in
23 humans."

24 Did I read that correctly?

25 A Yes, you did.

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1 Q All right. This is 30 years ago, almost to
2 this day.

3 A That's correct.

4 Q All right. Let me ask you this question,
5 sir: Based on your personal knowledge and
6 your involvement with the EPA report in
7 1993, has the cigarette industry -- and this
8 is in regard to people who smoke cigarettes,
9 correct, this document right here?

10 A That's correct.

11 Q It's about people who smoke and get cancer;
12 correct?

13 A That's correct.

14 Q All right. Now, in regard to people who are
15 exposed to environmental tobacco smoke and
16 get cancer, is it your experience that the
17 position of the cigarette industry in 1993
18 in the EPA report process was vigorous
19 denial?

20 A That's correct.

21 MR. OHLEMAYER: Excuse me, Your
22 Honor. I object to Mr. Motley's questions
23 being argumentative. I object to the
24 question calling for an opinion from this
25 witness. It isn't subject matter of his

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1 expertise or his stated qualification.

2 MR. MOTLEY: I asked him from his
3 personal experience. He was there.

4 MR. WAGNER: And no foundation.

5 MR. MOTLEY: Judge, he said he was
6 part --

7 THE COURT: Objections are
8 overruled.
9 Q Was it your experience that their position
10 was vigorous denial?
11 A Yes. They were quite vigorous.
12 MR. OHLEMAYER: Excuse me, Your
13 Honor. He's answered the question.
14 Q Just yes or no. Vigorous denial, yes or no?
15 A Yes.
16 Q Was their position about secondhand smoke
17 and whether the statistical evidence is
18 biased, was that their position?
19 A That was also their position.
20 Q And was their position that -- was their
21 position that nothing is proven?
22 A That was also their position.
23 Q And was it their position that animal
24 experiments don't tell us what happens in
25 humans?

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1 A Yes.
2 Q Let's turn to the case of Mildred Wiley, if
3 I might, Doctor.
4 THE COURT: Would you hand those
5 down.
6 Q First of all, Doctor, can you tell us just
7 generally the nature of the things that you
8 looked at in Mildred Wiley's case.
9 A I looked at her medical records, I looked at
10 the results of her autopsy, looked at
11 affidavits describing her work environment,
12 and some of the legal case documents.
13 Q Wait a minute. I missed something. You
14 said medical records?
15 A Medical records, affidavits, her autopsy
16 report, reports from other physicians
17 describing her care.
18 Q Dr. Turner, was that a name you remember?
19 A Yes.
20 Q Dr. Songer?
21 A Yes.
22 Q You looked at their reports?
23 A I did.
24 Q And I may not be spelling his name right.
25 Anything else? I'm not going to write

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1 all the doctors' names up there.
2 A And then there were some documents related
3 to some litigation.
4 MR. MOTLEY: Again, speak into this
5 direction, okay.
6 Q I forgot to ask you one thing about
7 synergism. I apologize. The jury has heard
8 there's something called radon gas. Are you
9 familiar with that?
10 A Yes.
11 Q Have you personally studied that as a health
12 physician?
13 A Yes. One of the chapters in this report was
14 on the effects of radon gas.
15 Q Okay. Now, this report being?

16 A The --
17 Q The one you were editor of?
18 A Cancer and Chronic Lung Disease in the
19 Workplace, yes.
20 Q There's actually a chapter in there about
21 radon?
22 A There is.
23 Q Back to that word "synergism." Is there a
24 synergism, in your opinion, between radon
25 exposure and cigarette smoke?

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1 A Yes, there is. And the synergism was
2 characterized slightly differently in that
3 it appears to be predominantly an
4 accelerating effect. That is, the effect is
5 much more prominent early in the life
6 experience of the individual rather than at
7 the very end of the life. And so you get
8 both more disease than you would expect, and
9 the disease occurs earlier than you would
10 expect.
11 Q So radon is an accelerant in that regard, in
12 connection with cigarette smoke?
13 A It is an independent cause of lung cancer
14 and it also, in combination with cigarette
15 smoke, produces more lung cancer than you
16 would expect from the sum of the two
17 exposures, and that cancer occurs earlier
18 than you would expect it to occur.
19 Q What is the typical age of people in the
20 United States who contract lung cancer?
21 A The typical age is usually late 60s.
22 Q Late 60s. From the records you know Mildred
23 Wiley died at age 56.
24 A That's right.
25 Q I've already tried my hand at spelling this.

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1 I failed, but --
2 A We demonstrated I don't do any better than
3 you do, so...
4 Q With my pad -- I hope, if the queen will
5 forgive me for not being able to spell her
6 language. Would you explain for the record
7 what cumulative dose means in connection
8 with cigarette smoke diseases?
9 A Obviously there are two measures of dose.
10 One is how much you are exposed to at any
11 moment in time, and the other measure is how
12 long you've been exposed to it. With
13 cigarettes, that's been described as pack
14 years; the number of packs you smoke per day
15 times the number of years you've been
16 smoking.
17 For other occupational exposures it may
18 be the numbers of fibers of asbestos in the
19 air times the number of years you've been
20 exposed to that, or the amount of radiation
21 in the air times the number of years you've
22 been -- number of months, actually, in that
23 setting, that you've been exposed.
24 Q If someone was exposed over a 30-year period

25 of time, let's say to asbestos, and got lung
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1 cancer from asbestos, could you identify
2 which exposure caused it or did they all
3 contribute?

4 A In general, we feel biologically that they
5 all contribute.

6 MR. MOTLEY: Your Honor, may I have
7 permission to do a little scientific
8 demonstration for the jury?

9 THE COURT: Go ahead.

10 Q Would you come down, Doctor.

11 A Sure.

12 MR. MOTLEY: This is about as far
13 as my science goes, too, Judge.

14 Let me get you this microphone.

15 THE WITNESS: I haven't a clue as
16 to what he's going to do.

17 MR. MOTLEY: That's good. I don't
18 either.

19 Q All right. I got a glass here, depending on
20 your perspective of life, is either half
21 full or half empty. All right? I'm going
22 to fill this up. It's already got water in
23 it, and I'm going to go like this. And now
24 just a little bit, pour it in a glass, run
25 over just a little bit, okay? See it's

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1 overflowing now?

2 A Yeah.

3 Q Which drop of water caused that glass to
4 overflow?

5 A We can't define that. I mean, we think of
6 things in terms of the last straw that
7 breaks the camel's back, but obviously it's
8 the entire weight that's on the camel's
9 back, not the last straw that was placed
10 there.

11 Q Every drop of water caused it to flow over?

12 A That's correct. Did I get that right, that
13 scientific demonstration?

14 Q Well, I got a wet sleeve out of it. Thank
15 you, Doctor.

16 Doctor, in regard to Ms. Mildred Wiley,
17 based on your review of all the evidence in
18 her case, can you tell the ladies and
19 gentlemen of the jury the cause of her
20 death?

21 A Yes, she died of lung cancer, lung cancer
22 caused by environmental tobacco smoke
23 exposure.

24 Q Can you tell the ladies and gentlemen of the
25 jury, like my little scientific experiment,

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1 whether the summation or the total of all of
2 her exposures contributed as a substantial
3 contributing factor to the lung cancer you
4 diagnosed?

5 MR. OHLEMAYER: May we approach for
6 the purpose of an objection, Your Honor?

7 THE COURT: All right.
8 (Bench discussion)
9 THE COURT: Last objection
10 overruled.
11 Now, Mr. Motley, if you would state the
12 question again.
13 MR. MOTLEY: I fear I won't be able
14 to, Your Honor. If I might ask the good
15 lady to repeat the last question I posed to
16 the witness and listen carefully, please.
17 (The requested material was read by the
18 reporter.)
19 A Yes, they do. And it means --
20 Q Now, you answered the question.
21 A Yes.
22 Q Now, let me ask you why you reached that
23 opinion.
24 A The people tend to think of lung cancer as
25 being hit by lightning because it -- they

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1 perceive it as when the diagnosis is made,
2 when they're told by their physician that
3 they've got lung cancer. But the process of
4 developing lung cancer isn't a one-time
5 step. It's not a one-step process.

6 What happens is very slowly over time,
7 gradually, there are changes in the DNA, the
8 controlling structure of the cell, that
9 slowly occur. You get one change, and then
10 that cell continues to divide, and then
11 there's another change in that cell. It now
12 has two changes.

13 And you get several changes that occur
14 slowly over time until finally the cell
15 loses its normal characteristics of stopping
16 its growth and not invading, and gains the
17 characteristics of a cancer, which are that
18 it grows in an unregulated way and invades
19 the tissue around it.

20 So this is a slow process that occurs
21 over time and requires a sequential exposure
22 to carcinogens throughout that period of
23 time in order to complete the process of
24 carcinogenesis or formation of the cancer.

25 So the only exposures that would not
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1 have contributed to Mrs. Wiley's lung cancer
2 would be the ones that she received after
3 she actually had the lung cancer.

4 Q Doctor, in general, in American society
5 today, is lung cancer a rare occurrence?
6 That is, is it a rare -- let me rephrase
7 that.

8 Is it a rare form of cancer?
9 A No. Unfortunately, lung cancer is now the
10 most common cause of cancer death in both
11 men and women.

12 Q And can you give us an approximation of how
13 many lung cancer deaths occur each and every
14 year in America?

15 A There are about 150,000 lung cancer deaths

16 each year.
17 Q Now, have you, sir, in the course of your
18 training and your experience, what you've
19 done with the Surgeon General, come to study
20 somewhat the rates of lung cancer in this
21 century in the United States?
22 A Absolutely. It's one of the critical issues
23 that we've examined.
24 Q And why has it been important for you to
25 examine the occurrence or the number of

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1 cases of lung cancer in the 20th Century in
2 America?
3 A Because one of the early issues that raised
4 the question of cigarette smoking causing
5 lung cancer was the fact that lung cancer
6 rates were increasing very dramatically
7 during this century, and that led to the
8 correct perception that we had an epidemic
9 of lung cancer and there began to search for
10 the cause of that epidemic of lung cancer.
11 Q I have displayed on the screen here -- are
12 you familiar with that, or something similar
13 to that, that graphic we just displayed?
14 A Yes, I am.
15 Q Doctor, if you don't mind, come down. Let
16 me ask you this: Does this fairly and
17 accurately depict part of the basis of your
18 opinion?
19 A Yes, it does.
20 Q And if you'll stand right there. And
21 remember the lady right beside you has to
22 that take this down, the Court and jury have
23 to hear you, Counsel does. Tell us the
24 significance of this chart.
25 A This is a chart that looks at lung cancer

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1 death rates per hundred thousand people.
2 That's the standard way of examining the
3 frequency with which people die of given
4 diseases.

5 That is averaged over the population.
6 And this is from 1950 through 1992 or 3.

7 What you can see --

8 Q Guess what Mr. Howard had.
9 A Oh, good. What you can see is that lung
10 cancer death rates in white males have
11 climbed substantially from 1950 peaking in
12 the late 1980s and have begun to decline.
13 Lung cancer death rates in black males,
14 which in the 1950s were below those for
15 white males, have now increased to well
16 above those for white males.

17 And rates in women, which had been
18 relatively low prior to the 1960s, have
19 begun to increase dramatically, with no real
20 difference between black and white women.

21 Q Doctor, has it sometimes been said that
22 epidemiologists are medical detectives?
23 A That's correct. They are commonly called
24 that.

25 Q Medical detectives. By training and
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1 experience and work with the Surgeon
2 General, are you an epidemiologist?

3 A Yes.

4 Q Have you yourself personally investigated
5 what's caused this dramatic lung cancer
6 change in incidence in the United States?

7 A Yes, I have.

8 Q I'm asking about you. Have you?

9 A Yes. Yes, I have. All of the work we do
10 tends to be with several individuals, but
11 yes.

12 Q You don't claim to be the author of all of
13 those pages over there.

14 A No.

15 Q Okay. Can you tell me, to a reasonable
16 degree of scientific certainty, what the
17 cause -- the leading cause of those numbers
18 shown on that graph are in your opinion in
19 the United States? What's been the reason
20 for this dramatic increase? You would call
21 that a dramatic increase, wouldn't you?

22 A I would call it a dramatic increase, and if
23 we go back further, it's even more dramatic.

24 Q What is the leading cause of that in the
25 United States?

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1 A The overwhelmingly largest cause of lung
2 cancer death is cigarette smoking.

3 Q Thank you. You may return.

4 Is there anything on there that you
5 think would be constructive or have we
6 covered it?

7 A No. Just if you go back further, the rates
8 drop even much lower.

9 Q Back further meaning the turn of the
10 century?

11 A At the turn of the century lung cancer could
12 be accurately described as a rare disease.

13 Q It was rare at the turn of the century?

14 A That's correct.

15 MR. MOTLEY: Your Honor, I'm about
16 to embark on another area, and as you
17 recall, we didn't quite get done this
18 morning with our notebook full of things we
19 were looking at. And I wonder if it might
20 be, particularly since the doctor is not
21 feeling well, if we could take that time up
22 doing that.

23 THE COURT: I think we will send
24 the jury home at this point. We've had a
25 good day. We've got a lot done today.

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1 Ladies and gentlemen, I discussed the
2 matter with the lawyers regarding tomorrow
3 afternoon. I realize, well realize, you
4 have things to do, errands and things of
5 that nature, business things. We're going
6 to knock off tomorrow about 4:00, maybe even

7 a little bit before, so you can maybe plan
8 your day a little bit better.
9 (Standard admonition).
10 I will see you tomorrow morning at
11 8:30.
12 MR. CASSELL: All rise.
13 THE COURT: Doctor, you may step
14 down.
15 THE WITNESS: Thank you, sir.
16 THE COURT: Thank you.
17 MR. MOTLEY: May the doctor be
18 excused?
19 THE COURT: I just did.
20 MR. MOTLEY: I'm sorry. I meant to
21 go back to the hotel.
22 THE COURT: Yes. Absolutely.
23 MR. MOTLEY: Your Honor, may I
24 approach for a moment?
25 THE COURT: Sure.

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1 MR. MOTLEY: Before I do that, may
2 I consult with my colleagues?
3 (A discussion was held off the record.)
4 MR. MOTLEY: Judge, I just want to
5 say, this puts me in an embarrassing
6 position. I overlooked this. You know, I
7 hate to keep bringing this up but it's an
8 important document, 33608. One of the
9 recipients of the document is none other
10 than Mr. Furr, who is counsel.
11 THE COURT: I saw that.
12 MR. MOTLEY: Oh, you did? Well, I
13 mean, you know, I'm sitting here being told
14 that they don't know who Bob is, and they
15 don't know who Sam is, and I think --
16 THE COURT: No. Actually I'm the
17 one that said that. And what I said was
18 that we need some evidence as to who Bob and
19 Sam might be here. And if there is evidence
20 in the record already, some of your
21 attorneys can show me.
22 But other than that, that's what I
23 said. And I did notice that he was on the
24 distribution list.
25 MR. MOTLEY: Well, let me say, Your

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1 Honor, I misspoke. I said it was Bob
2 Kloepfer, but I have now learned it was Bob
3 Lewis. And it is Sam Chilcoate who was
4 president of the institute. I now have
5 minutes from 1991.
6 All I'm saying is, Judge, you know,
7 this is going to be a long trial and I
8 just -- and I'm not casting any aspersions,
9 but it just seems to me as an officer of the
10 Court, we ought not to play games about who
11 Bob and Sam are and make me jump through
12 those hoops and make me go take depositions.
13 Well, I know and I think Mr. Furr knows well
14 who they are. Maybe he doesn't. But since
15 I have the minutes from 1991, Your Honor, of

16 the -- I don't mean to embarrass Mr. Furr.
17 He's been very nice to me. And I know what
18 I'm saying doesn't embarrass him. But
19 when -- let me finish.

20 MR. OHLEMAYER: We can short
21 circuit this.

22 THE COURT: Go ahead.

23 MR. OHLEMAYER: The fact that Bob
24 and Sam can be identified still doesn't tell
25 us whether Bob thinks that anybody agrees

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1 with this or whether this was Sam's idea
2 that Bob said was silly or whether -- I
3 mean, that's the point. There's got to be
4 more to this than just saying, well, I know
5 who Bob is.

6 THE COURT: You're telling me now
7 you're stipulating to who Bob and Sam might
8 be?

9 MR. OHLEMAYER: No, I don't know
10 who Sam and Bob might be.

11 MR. MOTLEY: Here's Mr. Furr.
12 Here's the minutes that demonstrate the same
13 Mr. Johnson who was at this meeting in 1991
14 with guess who, Sam Chilcoate Jr., the
15 president of the institute, Robert J. Lewis.
16 And they're talking about the Veteran's
17 Administration, Judge. I don't mean to
18 be --

19 THE COURT: Mr. Furr.

20 MR. FURR: Sure, Judge. I don't
21 know who Bob and Sam are. I've never
22 represented the Tobacco Institute, and I
23 didn't then. I don't now. I had been out
24 of law school for a year when that document
25 may or may not have been routed to me. I

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1 have no independent recollection of it. And
2 I can't help authenticate that document.

3 MR. MOTLEY: Well --

4 THE COURT: I'm not asking you to
5 at this point. Only thing I said, Mr.
6 Motley, was is there evidence in the record
7 that tells me who Bob and Sam are?

8 MR. MOTLEY: Well, I move to admit
9 these executive committee minutes, Your
10 Honor, 24389, and I think that demonstrates
11 who Bob -- it's got all three names on
12 there: James Johnson, Robert Lewis, and Sam
13 Chilcoate. Kurt Milgram is also mentioned.
14 They're all in those minutes. Those are all
15 produced, Your Honor, these are produced by
16 Liggett, to which there was no objection by
17 them. I don't think they object to the
18 authenticity.

19 THE COURT: Any objection to -- is
20 this marked?

21 MR. MOTLEY: Not yet, Your Honor, I
22 was just providing it.

23 MR. CASTLE: 26.

24 THE COURT: Plaintiffs' 26 would be

25 the minutes of the meeting of the executive
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1 committee. Any objection to that?

2 MR. SHOCKLEY: Who are they
3 offering it against, Your Honor?

4 MR. MOTLEY: Tobacco Institute
5 only.

6 THE COURT: Tobacco Institute only.

7 MR. OHLEMAYER: Objection on the
8 basis of relevance, Your Honor.

9 THE COURT: Any other objection?

10 MR. OHLEMAYER: Well, I think under
11 Rule 403, this is confusing, prejudicial,
12 and time consuming. And I also think it
13 seeks to introduce evidence of a
14 constitutionally protected lobbying activity
15 that has no relevance at this point to the
16 issues in this case.

17 There is no doubt that veterans smoke,
18 and there is no dispute in this case that
19 there were rules and procedures that may or
20 may not have been followed about where and
21 whether veterans can smoke. The fact that
22 there were groups of veterans who didn't
23 like those rules really doesn't seem to be
24 relevant. The fact that there were people
25 selling cigarettes who didn't like those

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1 rules doesn't seem to be relevant.

2 MR. MOTLEY: Should I respond?

3 THE COURT: 26 will be admitted.

4 (Plaintiffs' Exhibit(s) 26 received in
5 evidence.)

6 MR. MOTLEY: Your Honor, based on
7 26 being admitted, I now move again the
8 admission of the antecedent document,
9 No. 33608, against the Tobacco Institute and
10 RJ Reynolds at this time. I restrict it to
11 them at this time because Mr. Johnson was
12 the chairman of RJ Reynolds. I'd love to
13 hear them deny that.

14 THE COURT: Any objection now to
15 33608?

16 MR. OHLEMAYER: Same objection.

17 THE COURT: Same objection.

18 Objection is noted.

19 MR. OHLEMAYER: I'd ask a limiting
20 instruction that I hand the Court to be read
21 in connection with any publication of this
22 document.

23 MR. MOTLEY: May I have a moment to
24 look at this, Your Honor?

25 THE COURT: Certainly.

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1 MR. WAGNER: Of course, we have the
2 same objections to this briefing of James W.
3 Johnson document that we had before. I
4 mean, for all the reasons we've articulated
5 before, it's objectionable.

6 THE COURT: 33608 is offered

7 against Tobacco Institute.
8 (Plaintiffs' Exhibit(s) 33608 received
9 in evidence.)

10 MR. MOTLEY: And Reynolds.

11 THE COURT: And RJ Reynolds. And
12 it will be admitted.

13 MR. MOTLEY: Your Honor, my only
14 objection to the limiting instruction is the
15 last paragraph which states,
16 "Noerr-Pennington." Noerr-Pennington, Your
17 Honor, is a constitutional advocacy, First
18 Amendment right to petition the government,
19 and all the supreme court held in those
20 cases is you can't base a claim.

21 So I don't have any objection to the
22 first full paragraph which says we can't
23 base a claim, but that doesn't mean that
24 evidence of such activity cannot be the
25 basis of another claim.

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1 What this limiting instruction seeks to
2 do is say, well, ladies and gentlemen of the
3 jury, you can read this and be amused by it,
4 but it doesn't mean anything. And that's
5 not what a Noerr-Pennington says, Your
6 Honor. It's certainly not what you just
7 ruled in admitting this document. So I
8 don't object to the first paragraph, but I
9 do the second.

10 MR. OHLEMAYER: Your Honor, I think
11 the second paragraph is essentially the
12 point, which is you can't take this evidence
13 and then say because these people engaged in
14 this activity, I'm going to use it as a
15 basis for imposing liability.

16 MR. MOTLEY: No, sir. It's a
17 difference. I'm not imposing liability for
18 the advocacy, Your Honor, but it can be used
19 as evidence of another claim. The other
20 claim here, Your Honor, is a product claim
21 under Indiana law and a claim for punitive
22 damages under Indiana law.

23 We're not asking them to be punished
24 for their right to petition the government.
25 And that's -- the last sentence is what I

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1 object to, because that is a misstatement
2 and a corruption of Noerr-Pennington.

3 MR. OHLEMAYER: Your Honor, what
4 you just heard is exactly the problem.

5 THE COURT: No, I don't think --
6 the statement is a fair statement. I will
7 read that limiting instruction when the jury
8 is provided 33608.

9 Any other matters to come before the
10 Court this evening, Counsel?

11 MR. MOTLEY: Actually, Judge, I'm
12 about to fall down on my feet as I suppose
13 everybody else is. We don't have anything
14 else right now.

15 THE COURT: All right. We are in

16 recess until tomorrow morning at 8:30.
17 One other thing, Counsel, before we
18 leave. I don't know how this happened, we
19 had a file stamp up here that certain
20 pleadings have been used, or have been file
21 stamped with that file stamp. I noticed
22 yesterday some of the dates on those file
23 stamped pleadings may have read '97. I
24 don't know how that got changed, but if that
25 happens and if this happened with any

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1 particular pleading, we have corrected the
2 ones in the Court file, in the process right
3 now.

4 If you have a pleading that bears a
5 file stamped year of '97, the court reporter
6 will correct that with her initials. So it
7 may or may not have any import at this time
8 but I just thought I'd tell you.

9 Thank you, Counsel.

10 (The proceedings were adjourned at 5:30
11 p.m., to be reconvened on February 20, 1998,
12 at 8:30 a.m.)

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